

2613
No. 12425

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WALTER L. PENDERS and
FLORA PENDERS,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAR 9 1939

PAUL P. O'BRIEN,
CLERK

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UNITED STATES OF AMERICA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27202 H

WALTER L. PENDERS and FLORA PEN-
DERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST
DOE and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES UNDER
FEDERAL TORT CLAIMS ACT

Plaintiffs above named and each of them com-
plain of the United States of America, a sovereign
power, and First Doe and Second Doe, defendants
herein, and for causes of action allege:

First Cause of Action

Plaintiff Walter L. Penders complains of said
defendants and each of them and for cause of ac-
tion alleges:

I.

This action is brought under the Federal Tort
Claims Act of the Legislative Reorganization Act
of 1946, Public Law 601, Seventy-ninth Congress,
approved August 2, 1946, Public Law 601, and is
for a claim against the United States of America
for money only, accruing on May 11, 1946, on ac-

count of personal injuries, damage to and loss of property, caused by the negligent act or omission of defendants First Doe and Second Doe, employees of the defendant United States of America, while acting within the scope of their employment.

II.

That the true names of the defendants sued herein under the fictitious names of First Doe and Second Doe are unknown to plaintiffs, and plaintiffs pray leave, upon ascertaining the true names of said defendants, to amend this complaint to insert their said true names.

III.

Plaintiffs have at all times herein mentioned borne true allegiance to the Government of the United States of America and have in no way given encouragement to rebellion against the Government of the United States of America or at any time aided or abetted in any manner or given comfort to any sovereign government at war with the United States of America.

IV.

At all times herein mentioned plaintiffs have been and now are citizens of the United States of America and residents of the City of Pacific Grove, County of Monterey, State of California, residing at 208 Alder Street, Pacific Grove, California.

V.

That at all times mentioned herein Fremont

Street and Park Avenue were and now are public streets and highways situated in the County of Monterey, State of California.

VI.

That at all times herein mentioned First Doe was an employee of the United States Government, to wit, a member of the United States Army, and was acting in line of duty and within the scope of his employment under the Commanding General, Ninth Service Command, located at Fort Ord, California.

VII.

That on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff Walter L. Penders, with plaintiff Flora Penders as a passenger therein, was driving a 1945 Hupmobile Sedan automobile, then and there owned by said plaintiff Walter L. Penders, in an easterly direction on said Fremont Street and was turning said automobile at right angles northerly into said Park Avenue at the intersection of said Fremont Street with said Park Avenue; that at said time and place said defendant First Doe, acting as the agent, servant and employee of the other said defendant, the United States of America, and acting within the course and scope of his authority and employment as such agent, servant and employee, and with the knowledge, permission and consent of the said defendant the United States of

America, was operating and controlling a United States Army five-passenger Sedan automobile in a westerly direction on said Fremont Street; that at said time and place, and while the said car of plaintiff Walter L. Penders was turning as aforesaid, defendant First Doe so carelessly and negligently operated and controlled said United States Army Sedan automobile that the same was caused to and did collide with and strike the said 1945 Hupmobile Sedan automobile of said plaintiff Walter L. Penders with great force and violence.

VIII.

That said collision caused said plaintiff Walter L. Penders to be and he was cut, bruised, lacerated, shocked and injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: Comminuted fracture, left wrist, lower end of radius, with slight mushrooming of fragments. Oblique fracture, head of tibia. Contusion, abrasions, hands, trunk and lower extremities. Shock, trauma. Said plaintiff has incurred indebtedness for ambulances, nursing care, medical care and attention, hospitalization, X-Rays and physician's services reasonable necessary and required to treat his said injuries in the amount of Three Thousand Six Hundred and Sixty and 51/100 (\$3,660.51) Dollars; that because of the collision caused as aforesaid and as the proximate result of said collision, plaintiff's 1945 Hupmobile Se-

dan automobile was damaged; that said automobile was of a value in excess of \$2,750.00; that said automobile was sold for salvage for the sum of \$135.00; that said plaintiff, because of the damage to said automobile, has suffered further special damage in the sum of Two Thousand Six Hundred and Fifteen (\$2,615.00) Dollars.

IX.

That by reason of all and singular the premises aforesaid plaintiff Walter L. Penders has suffered general damages in the sum of Twenty Thousand (\$20,000.00) Dollars, together with special damages in the amount of Six Thousand Two Hundred and Seventy-five and 51/100 (\$6,275.51) Dollars.

Second Cause of Action

As and for a second, separate and distinct cause of action plaintiff Flora Penders complains of defendants and each of them and for cause of action alleges:

I.

That she is the wife of the above-named plaintiff Walter L. Penders.

II.

That she incorporates herein each, every, all and singular, generally and specifically, the allegations contained in Paragraphs I, II, III, IV, V, VI, and VII of the First Cause of Action of

plaintiff Walter L. Penders, as though fully set forth herein.

III.

That said collision caused plaintiff Flora Penders to be and she was cut, bruised, lacerated, shocked and injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: Comminuted fracture, femur, extending into knee joint; all of which injuries plaintiff Flora Penders is informed and believes are permanent in character.

IV.

That by reason of all and singular the premises aforesaid plaintiff Flora Penders has suffered general damages in the amount of Twenty Thousand Dollars (\$20,000.00).

Third Cause of Action

As and for a third, separate and distinct cause of action plaintiff Walter L. Penders complains of defendants and each of them and for cause of action alleges:

I.

That he is the husband of the above-named plaintiff Flora Penders.

II.

That he incorporates herein each and every, all and singular, generally and specifically, the allega-

tions contained in Paragraphs I, II, III, IV, V, VI, and VII of the First Cause of Action and Paragraph III of the Second Cause of Action, as though fully set forth herein.

III.

That said plaintiff Walter L. Penders has incurred indebtedness in the sum of Four Thousand Three Hundred and Eighty-three and 92/100 (\$4,383.92) Dollars to date, for ambulances, medical care and attention, hospitalization, X-Rays, and physicians' and surgeons' services reasonable necessary and required to treat the said injuries of plaintiff Flora Penders sustained as aforesaid. That plaintiff Walter L. Penders will be compelled to incur in the future an additional indebtedness for necessary medical care and attention, hospitalization, X-Rays, the services of physicians and surgeons, medicines, and nursing services to be rendered and furnished to said plaintiff Flora Penders in the future to treat her said injuries in an amount unknown at the present time; that plaintiff Walter Penders will be damaged in said amount and prays leave upon ascertaining said amount, to amend this complaint to insert said amount.

IV.

That by reason of all and singular the premises aforesaid plaintiff Walter L. Penders has suf-

ferred additional special damages in the amount of Four Thousand Three Hundred Eighty-three and 92/100 (\$4,383.92) Dollars, together with insertion for additional special damages, as alleged above.

Wherefore, plaintiffs pray judgment against defendants and each of them as follows:

1. In favor of plaintiff Walter L. Pender in the sum of Twenty-six Thousand Two Hundred and Seventy-five and 51/100 Dollars for damages as alleged herein in the First Cause of Action.

2. In favor of plaintiff Flora Penders in the sum of Twenty Thousand (\$20,000.00) Dollars for general damages as alleged herein in the Second Cause of Action.

3. In favor of plaintiff Walter L. Penders in the sum of Four Thousand Three Hundred and Eighty-three and 92/100 (\$4,383.92) Dollars together with insertion for additional special damages, all as alleged herein in the Third Cause of Action.

4. For costs of suit herein and for such other and further relief as may be meet and proper in the premises.

/s/ ROBERT E. HALSING,

/s/ EUGENE H. O'DONNELL,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 9, 1947.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Now comes the defendant, United States of America, and answering the complaint, denies and alleges as follows:

Answering the first cause of action.

I.

Denies all the allegations of paragraph VI.

II.

Denies all the allegations of paragraph VII except it is admitted that on May 11, 1946, at about 6:40 p.m. of said day the plaintiff Walter L. Penders was driving an automobile then and there owned by said Penders in a generally easterly direction on Fremont Street at the intersection of Fremont Street and Park Avenue.

III.

Denies all the allegations of paragraphs VIII and IX.

Answering the second cause of action:

I.

Answering paragraph II, incorporates herein all the denials contained in the answer to the first cause of action.

II.

Denies all the allegations of paragraphs III and IV.

Answering the third cause of action:

I.

Answering the second paragraph, this defendant incorporates herein, as though fully set forth, all the denials set forth in its answer to the first cause of action.

II.

Denies all the allegations of paragraphs III and IV.

As and for a separate and further defense, defendant alleges that the plaintiffs were careless and negligent in and about the matters set forth in said complaint, and carelessly and negligently drove and operated their automobile, and that said carelessness and negligence of the plaintiffs was the proximate cause of the alleged damages, and proximately contributed thereto.

For a further and separate answer and by way of a cross-complaint, defendant and cross-complainant alleges:

I.

This is a civil action brought by the United States of America and over which this Court has original jurisdiction by virtue of the fact that the United States is plaintiff.

II.

That on the 11th day of May, 1946, at or near the intersection of Fremont Street with Park Avenue and Hugatito Road, in the County of Monterey, State of California, Walter L. Penders negligently drove his Hupmobile Sedan against the 1941 Chevrolet automobile, the property of the cross-complainant, which was then being driven as aforesaid.

As a result the cross-complainant's vehicle was damaged and the cross-complainant incurred expenses for the repair of the same in the sum of \$326.91, which sum is the reasonable value of the cost of repairs thereof and is a sum less than the diminution in value of said automobile.

Wherefore defendant and cross-complainant prays that the complaint be dismissed and that it has judgment against Walter L. Penders in the sum of \$326.91, together with costs.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant
and Cross-Complainant United States of
America.

/s/ WILLIAM E. LICKING,
Asst. U. S. Attorney.

[Endorsed]: Filed Dec. 19, 1947.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Now come the plaintiffs Walter L. Penders and Flora Penders and answering the Cross-Complaint on file herein, deny and allége as follows:

I.

Answering the allegations of Paragraph II of said Cross-Complaint plaintiffs deny all of the allegations thereof and plaintiffs deny that cross-complainant's vehicle was damaged in the sum of \$326.91 or in any other sum or at all.

Wherefore plaintiffs pray that defendant and cross-complainant take nothing by its cross-complaint and that said cross-complaint be dismissed.

/s/ ROBERT E. HALSING,

/s/ EUGENE H. O'DONNELL,

Attorneys for Plaintiffs and
Cross-Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 22, 1947.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files herein his amendment to the second cause of action

in plaintiffs' complaint on file herein contained, and in this regard said plaintiff alleges:

I.

That Flora Penders was during all the times herein mentioned the wife of plaintiff, Walter L. Penders.

II.

That plaintiff, Walter L. Penders, incorporates herein each and every, all and singular, the allegations contained in Paragraphs I, II, III, IV, V, VI and VII of his first cause of action, as though fully set forth herein.

III.

That as a result of the aforesaid collision, Flora Penders was cut, bruised, lacerated and shocked, both internally and externally, from which injuries said Flora Penders died on the 10th day of April, 1949.

IV.

That plaintiff, Walter L. Penders, is the sole, surviving heir at law of said Flora Penders.

V.

That by reason of the carelessness and negligence of defendants, and as the direct and proximate result thereof, plaintiff, Walter L. Penders, was compelled to, and did, incur an indebtedness in the sum of Eight Hundred and Seventy-five

Dollars (\$875.00) for the funeral expenses for the burial of said Flora Penders, and that said sum is the reasonable value of said funeral expenses.

VI.

That by reason of said carelessness and negligence of said defendants, and as a direct and proximate result thereof, plaintiff has been damaged in the sum of Twenty Thousand Dollars (\$20,000.00).

/s/ [Indistinguishable.]

/s/ ROBERT HALSING,

Attorneys for Plaintiffs.

State of California,

City and County of San Francisco—ss.

Walter L. Penders, being first duly sworn, deposes and says: That he is one of the plaintiffs named in the above entitled action; that he has read the within and foregoing amendment to complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those, that he believes the same to be true.

/s/ WALTER L. PENDERS.

Subscribed and sworn to before me this 14th day of April, 1949.

[Seal] /s/ ROBERT E. HALSING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files an amendment to the first cause of action of plaintiffs' complaint on file herein by amending Paragraph VIII thereof to read in part as follows:

“Said plaintiff has incurred indebtedness for ambulance, nursing care, medical care and attention, hospitalization, x-rays and physicians' services reasonably necessary and required to treat his said injuries, in the amount of \$6,200.00.

/s/ EUGENE H. O'DONNELL,

/s/ ROBERT E. HALSING,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, Walter L. Penders, and by leave of court first had and obtained, files an amendment to the third cause of action of plaintiffs' complaint on file herein by substituting in lieu of Paragraph III thereof the following:

“That said plaintiff, Walter L. Penders, has incurred an indebtedness in the sum of \$17,767.19 for ambulance service, medical care and attention, hospitalization, x-rays, and physicians' and surgeons' services, reasonable, necessary and required to treat the said injuries of said Flora Penders, his wife, sustained as aforesaid, which charges made for said services are the reasonable cost thereof.”

/s/ EUGENE H. O'DONNELL,

/s/ ROBERT E. HALSING,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

This matter having been submitted to the Court, it is

Ordered that upon findings of fact to be submitted in accordance with the rules, judgment may be entered in favor of the plaintiff Walter L. Penders and against the defendant United States of America as follows:

Special damages for hospitalization and medical services for Flora Penders	\$17,767.19
Special damages for hospitalization and medical services for Walter L. Penders	5,181.49
Damages to automobile of Walter L. Penders	150.00
General damages to plaintiff Walter L. Penders for injuries to himself	15,000.00
General damages to plaintiff Walter L. Penders for loss of his wife, Flora Penders	15,000.00

Dated: June 3rd, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

The above-entitled matter came on regularly for trial before the above-entitled court, sitting without a jury, the Honorable Herbert W. Erskine, Judge presiding, on the 14th, 15th and 19th days of April, 1949, plaintiff, Walter L. Penders, appearing in person and by and through his attorneys, Messrs. Eugene H. O'Donnell and Robert E. Halsing, and defendant, United States of America, appearing by and through Frank J. Hennessy, its attorney, represented by R. J. Scholz, Esq., and evidence, both oral and documentary, having been introduced on the issues raised by plaintiffs' complaint and defendant, United States of America's answer thereto, and said defendant's cross-complaint and said plaintiffs' answer thereto, and the cause having been submitted for decision, and the Court being fully advised in the premises, makes its Findings of Fact and Conclusions of Law as follows:

I.

That it is true that the above-entitled action was brought under the Federal Tort Claims Act of the Legislative Reorganization Act of 1946, Public Law 601, Seventy-ninth Congress, approved August 2,

1946, and is for a claim against the United States of America for money only, accruing on May 11, 1946, on account of personal injuries, damage to and loss of property, caused by the negligent act or omission of an employee of the United States of America while acting within the scope of his employment.

II.

That it is true that plaintiffs have at all times herein mentioned borne true allegiance to the Government of the United States of America and have in no way given encouragement to rebellion against the Government of the United States of America, or at any time aided or abetted in any manner or given comfort to any sovereign government at war with the United States of America.

III.

That it is true that at all times herein mentioned plaintiffs have been citizens of the United States of America and residents of the City of Pacific Grove, County of Monterey, State of California, residing at 208 Alder Street, Pacific Grove, California, and that plaintiff Walter L. Penders is now such citizen and resident.

IV.

That it is true that at all times herein mentioned Fremont Street and Park Avenue were, and now

are, public streets and highways in the City of Monterey, State of California.

V.

That it is true that at all times herein mentioned Carl B. Wanless, sued herein as First Doe, was an employee of the United States Government, to-wit: a member of the United States Army and acting in line of duty and within the scope of his employment under the Commanding General, Ninth Service Command, located at Fort Ord, California.

V.

That it is true that on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff, Walter L. Penders, with Flora Penders as a passenger therein, was driving his 1934 Hupmobile Sedan automobile, then and there owned by said plaintiff, Walter L. Penders, in an easterly direction on said Fremont Street, and at said time was turning northerly into said Park Avenue at the intersection of said Fremont Street and Park Avenue, at which time, and for sometime prior thereto, plaintiff, Walter L. Penders, had extended his arm indicating his intention of making the aforesaid turn; that at said time and place said Carl B. Wanless, acting as the agent, servant and employee of defendant, United States of America, and acting within the course and scope of his authority and employment as such agent, servant and

employee, and with the knowledge, permission and consent of said defendant, United States of America, was operating and controlling a United States Army 1941 Chevrolet panel truck in a westerly direction in the outer west bound lane of said Fremont Street; that it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed; that it is true that at said time said defendant, Carl B. Wanless, operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection of said Fremont Street and Park Avenue; that it is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approximately 150 to 175 feet to a person approaching said intersection from the westerly direction; that it is true that when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of completing his turn and was in the outer west bound lane of Fremont Street; that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm; that it is true that at said time there were no vehicles ahead, abreast or behind said defendant, Carl B. Wanless, in the inner or outer west bound lane; that it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there

negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street.

VII.

That it is true that by reason of the aforesaid carelessness and negligence of the defendant, Carl B. Wanless, and as a proximate result thereof, the said plaintiff, Walter L. Penders, was caused to be, and he was, cut, bruised, lacerated, chocked and injured and made sick, sore and lame, both internally and externally, and was more particularly injured as follows: that he received a comminuted fracture of the left wrist, lower end of radius, with mushrooming of fragments; oblique fracture, head of tibia; contusions; abrasions of the hands, trunk and lower extremities; shock; trauma. That it is true that said injuries to the left wrist and the head of the tibia of plaintiff, Walter L. Penders, are permanent in nature.

VIII.

That it is true that said plaintiff, Walter L. Penders, has incurred indebtedness for ambulance, nursing care, medical care and attention, hospitalization, X-rays and physicians' services reasonable, necessary and required to treat his said injuries in the amount of Five Thousand One Hundred Eighty-one and 49/100 Dollars (\$5,181.49); that the

reasonable value of the special damages of plaintiff, Walter L. Penders, as aforesaid, is Five Thousand One Hundred Eighty-one and 49/100 Dollars (\$5,-181.49).

IX.

That it is true that because of the carelessness and negligence of said defendant, Carl B. Wanless, as aforesaid, and as the proximate result thereof, plaintiff, Walter L. Penders' 1934 Hupmobile Sedan automobile was damaged; that pursuant to the stipulation of the parties to the above entitled action in open Court made, plaintiff, Walter L. Penders, by reason of the damage to said automobile, suffered further special damage in the sum of One Hundred and Fifty Dollars (\$150.00).

X.

That it is true that by reason of the aforesaid carelessness and negligence of defendant, United States of America, plaintiff, Walter L. Penders, suffered general damages in the sum of Fifteen Thousand Dollars (\$15,000.00).

XI.

That it is true that Flora Penders was the wife of Walter L. Penders; that it is true that Flora Penders died on April 10, 1949; that it is true that the death of Flora Penders was the direct and proximate result of the injuries sustained by her

through the carelessness and negligence of the defendants, as aforesaid.

XII.

That it is true that by reason of the carelessness and negligence of defendant, United States of America, as aforesaid, and as a proximate result thereof, Flora Penders was cut, bruised, lacerated, shocked and injured and was made sick, sore and lame, both internally and externally, and was more particularly injured as follows: comminuted fracture, femur, extending into knee joint; concussion of the brain, contusions and abrasions of the face, head, trunk and extremities; severe inter-cranial damage; severe damage to kidneys and internal organs; from which injuries Flora Penders died as aforesaid on April 10, 1949.

XIII.

That it is true that plaintiff, Walter L. Penders, was the husband of said Flora Penders.

XIV.

That it is true that prior to the death of Flora Penders as a result of the carelessness and negligence of defendants as aforesaid, and as a proximate cause thereof, plaintiff, Walter L. Penders, was obliged to and did expend the sum of Seventeen Thousand Seven Hundred and Seventy-six and 19/100 Dollars (\$17,767.19) for ambulance, medical

care and attention, hospitalization, X-rays, and physician's and surgeon's services, reasonable, necessary and required to treat the said injuries of the said Flora Penders, his wife, sustained as aforesaid, and that the said charges made for the said services were the reasonable cost thereof.

XV.

That it is true that by reason of the aforesaid carelessness and negligence of defendant, United States of America, which caused the wrongful death of Flora Penders, plaintiff, Walter L. Penders suffered further general damages in the sum of Fifteen Thousand Dollars (\$15,000.00).

XVI.

That it is not true that plaintiff, Walter L. Penders, was careless and negligent in driving and operating his 1934 Hupmobile Sedan automobile at the aforesaid time and place.

XVII.

That it is not true that the damage sustained by the defendant, United States of America's 1941 Chevrolet panel truck at the aforesaid time and place was due to the carelessness and negligence of plaintiff, Walter L. Penders.

XVIII.

That it is not true that plaintiff, Walter L. Penders, negligently drove his Hupmobile Sedan

automobile against the United States of America's 1941 Chevrolet panel truck.

XIX.

That the plaintiffs, Walter L. Penders and Flora Penders, employed Eugene H. O'Donnell and Robert E. Halsing as their attorneys to prosecute their claim in the above entitled action and they are entitled to reasonable attorney's fees in connection therewith.

Conclusions of Law

The Court makes the following Conclusions of Law from the foregoing Findings of Fact:

I.

That the above entitled Court has jurisdiction of this action.

II.

That defendant, United States of America, was negligent in the manner in which it operated and controlled its 1941 Chevrolet panel truck, which said negligence proximately caused the injuries and damages to plaintiff.

III.

That plaintiff, Walter L. Penders, is entitled to judgment against defendant, the United States of America, as follows:

Special damages for hospitalization and medical services for Flora Penders.	\$17,767.19
Special damages for hospitalization and medical services for Walter L. Pen- ders	5,181.49
Damage to automobile of Walter L. Pen- ders	150.00
General damages to plaintiff, Walter L. Penders for injuries to himself	15,000.00
General damages to plaintiff, Walter L. Penders for loss of his wife, Flora Penders	15,000.00
	\$53,098.68

together with his costs of suit; and that interest be paid on the total amount of said judgment at the rate of four (4%) percent per annum from the date of said judgment until paid.

IV.

That the sum of Ten Thousand Six Hundred and Nineteen and 73/100 Dollars (\$10,619.73) is the reasonable sum to be paid to Eugene H. O'Donnell and Robert E. Halsing for attorneys' fees for services rendered plaintiff, Walter L. Penders, said sum being twenty percent (20%) of the judgment

awarded plaintiff herein. Said sum is not in addition to the said judgment, but is a part thereof.

Let the Judgment be Entered Accordingly.

Dated: This day of 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Receipt of copy acknowledged.

Lodged July 5, 1949.

[Endorsed]: Filed July 13, 1949.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27202-E

WALTER L. PENDERS and FLORA PEN-
DERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST
DOE and SECOND DOE,

Defendants.

JUDGMENT

This cause came on regularly for trial before the above entitled Court, sitting without a jury, on the 14th, 15th and 19th days of April, 1949, plaintiff Walter L. Penders appearing in person and by and

through his attorneys Eugene H. O'Donnell and Robert E. Halsing, and defendant United States of America appearing by and through its attorney Frank J. Hennessy, represented by R. J. Scholz, and evidence both oral and documentary having been introduced on the issues raised by plaintiff's Complaint and defendant United States of America's Answer thereto, and said defendant's cross-Complaint and said plaintiffs' Answer thereto, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That plaintiff Walter L. Penders have judgment against the defendant United States of America in the sum of \$53,098.68, with interest thereon at the rate of 4% per annum from the date hereof until paid.

II.

That out of the said sum of \$53,098.68 awarded to plaintiff Walter L. Penders, the sum of \$10,619.73 shall be paid to his attorneys, Eugene H. O'Donnell, Esquire, and Robert E. Halsing, Esquire, as and for their attorney's fees.

III.

That said plaintiff have judgment against said

defendant for his costs herein in the amount of \$55.80.

Dated: July 13th, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Entered in Civil Docket July 14th, 1949.

Lodged 6-14-49.

[Endorsed]: Filed July 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs in the above-entitled action and to their Attorneys, Eugene H. O'Donnell and Robert E. Halsing:

You and each of you please take notice that defendant in the above-entitled action hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment given and entered in the above-entitled action and from the whole thereof, which judgment was entered on the 14th day of July, 1949.

September 7th, 1949.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant, United States of America.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the defendant and appellant, United States of America, may have to and including the 5th day of December, 1949, to docket cause and file the record on appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: October 10th, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed October 10, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR PREPARATION OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant having filed herein its Notice of Appeal in the above-entitled action, you are hereby requested to prepare record on appeal consisting of the following:

1. Complaint and amendment to complaint.
2. Answer and cross-complaint.
3. Answer to cross-complaint.
4. Order for judgment.

6. Findings and conclusions of law.
7. Judgment.
8. Notice of appeal.
9. Copy of this praecipe.
10. Reporter's Transcript of the evidence and proceedings.
11. Deposition of W. L. Penders.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The Trial Court erred

1. In not finding plaintiff Walter L. Penders was guilty of contributory negligence.

2. That the following findings of fact are not supported by the evidence:

(a) Wanless operating his vehicle at excessive speed or without due care and caution.

(b) Wanless observed said vehicle when plaintiff was in the act of completing his turn; that when Wanless, on first observing plaintiff's auto-

mobile, negligently turned his vehicle to the right.

(c) That by reason of defendant's negligence plaintiff suffered damage.

(d) That the death of Flora Penders was the direct and proximate result of injuries sustained through the carelessness or negligence of defendant.

(e) That by the death of Flora Penders, plaintiff, Walter Penders suffered damages in the sum of \$15,000.

(f) That it is not true that Walter Penders was careless or negligent.

(g) That the conclusion of law that Walter L. Penders is entitled to general damages for the death of Flora Penders is not supported.

3. That the damage is excessive.

4. That Flora Penders died April 10, 1949, and that she could only appear by her personal representative.

5. In excluding evidence that plaintiffs were insured or were compensated in any way for damages alleged by them.

6. That there is insufficient evidence to justify the Court's decision.

Dated: December 12, 1949.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1949.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 27202 H

WALTER L. PENDERS and FLORA PEND-
ERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, FIRST DOE
and SECOND DOE,

Defendants.

Before: The Honorable Herbert W. Erskine.
(No jury.)

Thursday, April 14, 1949, 10 a.m.

Appearances:

ROBERT E. HALSING, ESQ.,
EUGENE H. O'DONNELL, ESQ.,
For the Plaintiffs.

FRANK J. HENNESSY, ESQ.,
United States Attorney,

By RUDOLPH J. SCHOLZ, ESQ.,
Assistant United States Attorney,
For the Defendants.

PROCEEDINGS

The Clerk: Case of Penders versus the United
States for trial.

Mr. O'Donnell: It is ready, if the Court please,

for the plaintiffs. May it please the Court, in this matter before we proceed, an examination of the file discloses there were two parties plaintiff, Walter L. Penders and Flora Penders, his wife.

The Court: I have read the complaint.

Mr. O'Donnell: You have read the complaint. Flora Penders passed away last Sunday, Your Honor, so by that reason, her name will have to be deleted as a party plaintiff. In view of the shortness of time, I am asking leave at this time to amend my second cause of action, which is the cause of action where I have asked damages on behalf of Mrs. Penders and substitute an amendment wherein I ask damages to the extent of \$20,000 on behalf of Mr. Penders as a result of the death of Mrs. Penders.

The Court: You claim now that the death of Mrs. Penders resulted from the accident?

Mr. O'Donnell: I do, yes.

The Court: That will be granted.

Mr. O'Donnell: And I will file the amendment duly verified. Typical of Mr. Scholz, we stipulated a diagram and he tells me he left the diagram upstairs on his desk and I have just sent Mr. Halsing up for it and Mr. Halsing—do you desire an opening statement?

The Court: I would like to hear what the facts are.

Mr. O'Donnell: I see. —and Mr. Halsing is going to make the opening statement and so if you will just bear with us for just a few minutes?

The Court: Sure.

Mr. O'Donnell: Thanks.

Mr. Scholz: I think he possibly [2*] failed to include that it was only through my efforts that we got a diagram (laughing) after he failed to get one.

Mr. O'Donnell: Of course, you are going to pay for it.

The Court: Well, we will recess then.

Mr. O'Donnell: I'm awfully sorry, Judge.

The Court: That's all right.

(Few minutes recess.)

Mr. Halsing: Your Honor. This is an action, Your Honor, for personal injuries filed under the provisions of the Federal Tort Act. The plaintiffs, Walter Penders and Flora Penders, were husband and wife, both of whom resided at Pacific Grove, in Monterey County, California. Mrs. Flora Penders died on last Sunday morning, April 10, 1949, leaving Walter Penders, the surviving husband, the sole plaintiff in this action. On May 11, 1946, at 6:40 p.m., Walter Penders was driving his automobile in an easterly direction on Fremont Avenue in the City of Monterey approaching the intersection of that street with Park Avenue. The diagram is so drawn that north, of course—well, usually north is on the top of the diagram, west is out in this direction and east is this way. So the Penders car was traveling in an easterly direction. At this time Walter Penders was accompanied by his wife and one Catherine Hunt, both of whom were in the

* Page numbering appearing at top of page of original Reporter's Transcript.

rear seat of the automobile. One Dayid F. Edmund accompanied them [3] also and he sat in the front of the automobile with Mr. Penders.

At this same time one Carl B. Wanless, a soldier of the United States Army, was traveling, operating a Government-owned automobile, along Fremont Street in a westerly direction approaching this intersection with Park Avenue. Mr. Wanless was stationed at Fort Ord, California, and he was accompanied at the time by another soldier.

As indicated by the diagram, it will be noticed that Fremont Street is a four-lane highway with a double white center line dividing the eastbound and westbound lanes. The street approaching east towards Park Avenue ascends a grade of approximately ten per cent and then it takes a dog's leg very slight turn to the left, continuing on in an easterly direction and that turn is just at the crest of the grade. Park Avenue is just below the crest of the grade. East of Park Avenue, it will be noted that Fremont Street is a four-lane highway with a northerly westbound lane abutting right on, the edge of the pavement right on the sidewalk curbing. West of Park Lane, it will be noted that between the northbound lane and the sidewalk curbing, there is a gravel, unimproved gravel shoulder approximately fifteen feet wide. This is, for practical purposes, a third lane on the highway going in a westerly direction west of Park Avenue.

We will show that the plaintiff, Walter Penders, was [4] traveling about twenty miles an hour east-

erly on Fremont when he started to make a lefthand turn into Park Avenue and that before starting his lefthand turn, Walter Penders looked ahead up the hill where he had a view of at least 300 feet and that he saw no traffic approaching and that he then made his lefthand turn after giving a proper hand signal.

We will show that he crossed the center line and the inner westbound lane of Fremont and was about two-thirds across, of the way across the outer westbound lane when the United States Army panel truck came over the crest of the grade at a rapid pace and struck the automobile of the plaintiff on the left, I mean on the right front fender, the right front side of the car. We will show that the force of the impact swung the plaintiff's car in a northwesterly direction, shunting it up to the northerly curb-line. At the time of the accident, Mr. Edmund who was riding in the front seat with Mr. Penders, was thrown from the car and he received head and chest injuries and died several days later. We will show that the plaintiff, Walter Penders, was thrown to the front of the driver's compartment and that he was rendered unconscious and we will show that his wife, Mrs. Penders, was thrown to the floor of the rear compartment of the car and that she also was rendered unconscious.

We will show that the Government vehicle laid down approximately 104 feet of skidmarks up to the point of impact [5] and that the plaintiff, Walter Penders' automobile, laid down no skidmarks what-

ever. We will show that the force of the impact was so severe that it threw the jump seats and the windshield from the Government panel truck clear over the automobile of the plaintiff on this action. We will show that the plaintiff, Walter Penders, as a result of this accident suffered severe injuries necessitating his hospitalization from May 11, 1946, up to March 25, 1947, and we will show that his wife, Flora Penders, as the result of the accident also suffered severe injuries necessitating her hospitalization from the day of the accident, May 11, 1946, up till last Sunday, April the 10th, 1949, the date of her death and we will also show that Flora Penders died as a result of the injuries she suffered on May 11, 1946, and we will also show to date the plaintiff, Walter Penders, has been put to an expense of over \$20,000 for hospitalization and medical care and attention for himself and his wife.

The Court: You prayed, didn't you, in your complaint \$6,000 for him, including the damage to the car, about \$6,000?

Mr. Halsing: Yes, Your Honor.

The Court: About \$4,000 for her?

Mr. Halsing: Yes, but——

The Court: That makes approximately ten.

Mr. Halsing: But that complaint was filed approximately two years ago. [6]

The Court: I see.

Mr. Halsing: In May of 1947.

The Court: Yes.

Mr. O'Donnell: And we are going to ask to

amend the complaint to strike out the proof, may it please the Court, later on in the trial. Now, for the purpose of the record I would like a few stipulations as to the width of this highway. I note according to the diagram that it's one inch for each twenty feet, and so it will be stipulated, Mr. Scholz, that the diagram shows the width of the highway, of Fremont Extension or Fremont Street at $2\frac{1}{8}$ inches, that will be forty—can you help us out there, Your Honor— $2\frac{1}{8}$ inches, that will be forty, a little over forty feet.

Mr. Scholz: That will be $2\frac{1}{2}$ inches, about $42\frac{1}{2}$ feet.

Mr. O'Donnell: Forty-two and a half feet wide.

The Court: Is that the width over all of the highway?

Mr. O'Donnell: The width of the highway.

The Court: Yes, between curb and curb?

Mr. O'Donnell: No, no. From edge of the pavement to edge of the pavement.

Mr. Scholz: The colored is paved, Your Honor. The color here, that's the pavement, as I understand it.

The Court: Forty feet?

Mr. O'Donnell: Forty-two and a half [7] feet.

Mr. Scholz: Yes.

Mr. O'Donnell: Yes, $42\frac{1}{2}$ feet. And that the shoulder or gravel pavement on the west side of, on the north side of Fremont Street west of Park Avenue is three-quarters, sixteen feet. Sixteen feet in width. Is that o.k.?

Mr. Scholz: That's all right.

Mr. O'Donnell: And——

Mr. Scholz: May I suggest this? Counsel approving, I will just put a mark here indicating the width. Is that agreeable, Your Honor?

Mr. O'Donnell: It's agreeable.

Mr. Scholz: 42½, and this you make it how much?

Mr. O'Donnell: Sixteen.

Mr. Scholz: So we won't forget it. I won't remember.

Mr. O'Donnell: I think that's everything. Now, may it please the Court, I would like to ask leave of court at this time to call Dr. Dormody, the attending physician. He has come up here from Monterey. He is a very busy man, and do you have any objection?

Mr. Scholz: No, Your Honor.

The Court: Mr. Scholz, do you want to make an opening statement now, or after the doctor——

Mr. Scholz: Whatever you please, Your Honor. It's immaterial to me.

The Court: Well, let's take the doctor first and then [8] either Mr. Scholz can make his opening statement now or he can make it at the beginning of his case, although I would like to know what you claim before we go ahead.

Mr. Scholz: I will make it as soon as the doctor——

Mr. O'Donnell: Doctor, will you take the stand, please?

DR. HUGH F. DORMODY

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. O'Donnell:

The Court: Dr. Hugh F. Dormody?

The Witness: I think you know my brother.

Mr. Scholz: In view of the fact that the Court knows the brother, I will stipulate that he is qualified.

Mr. O'Donnell: Well, I would prefer it for the record. Sit down, please.

Q. Your name is Hugh F. Dormody?

A. Yes.

Q. And what is your business or profession?

A. I am a physician and surgeon.

Q. And you have been practicing your profession as a physician and surgeon in Monterey for some years past, is that correct? A. Yes, sir.

Q. And how long, Doctor?

A. I have been practicing in Monterey since January 1, 1923. [9]

The Court: Twenty-six years.

Q. And of what school are you a graduate?

A. University of California.

Q. And how long have you been practicing your profession as a physician?

A. Twenty-eight years.

Q. During all that time you have been a duly

(Testimony of Dr. Hugh F. Dormody.)

licensed practicing physician in the State of California, is that correct? A. Yes, sir.

Q. Are you connected with any hospitals, Doctor? A. Monterey Hospital.

Q. And that is located in Monterey, California?

A. Yes, sir.

Q. And you have been connected with that hospital for how long? A. Since April 7, 1930.

Q. Now, do you know Walter Penders?

A. I do.

Q. And when did you first become acquainted with Walter Penders?

A. The 11th of May, 1946.

Q. On that occasion, did you attend him as an attending physician? A. I did.

Q. And where did you first see him on that day?

A. In the emergency room of Monterey Hospital.

Q. At approximately what time? Do you have that? A. Seven o'clock P.M.

Q. Seven o'clock. And will you tell us what observations you made of Mr. Penders at that time?

A. At the time I first saw him, he was in shock. His preliminary physical findings [10] were fracture of the left wrist and a fracture of the left tibia into the left knee joint. He had multiple contusions, abrasions and lacerations of his hands, face, trunk and lower extremities.

Q. And what, if any, treatment did you administer at that time, Doctor?

A. Well, he was treated immediately for shock.

(Testimony of Dr. Hugh F. Dormody.)

At the same time his fractures were temporarily immobilized to keep them from further inducing shock by painful movements. And he was hospitalized.

Q. He was hospitalized immediately, was he?

A. Immediately.

Q. Now, can you tell us when the next time was that you saw Mr. Penders?

A. I saw him several times during the night because of his condition and the condition of the other occupants of the car and was in constant attendance until March 24, 1947.

Q. Now, confining yourself to the last time, Doctor: His left wrist, was it? A. Yes.

Q. You say he suffered a fracture of the left wrist?

A. Yes, a comminuted fracture of the left wrist.

Q. And what, if any, treatment did you furnish?

A. The fracture was immobilized, reduced and, as well as the fracture of his left knee.

Q. Well, did you cause X-rays to be taken, Doctor?

The Court: Those are——

A. We did.

The Witness: I think they have gotten mixed up here, [11] Judge.

Q. (Continuing): X-rays were taken of his wrist and knee.

The Court: Were either of those open reductions?

(Testimony of Dr. Hugh F. Dormody.)

The Witness: No, there were no open reductions performed. These are X-rays that were taken at the time. Because of the severe shock that he was in, it was rather difficult to do much for him. Here's the wrist. Here's the fractures of his left—

Q. Let us take one think at a time, Doctor, if you will.

The Court: Will you do that so we can examine one at a time?

The Witness: The fracture of his left forearm showing a comminuted fracture of his left radius.

Q. Will you point out to the Court just where the—

A. The fracture is here. These pictures were taken with a portable X-ray in a bed. He was not moved to the X-ray room at the time. You see the fracture here with considerable dislocation.

The Court: Which arm was that?

The Witness: Left.

Mr. O'Donnell: Left.

The Court: Left.

Q. Is that what you call a linear fracture or was it comminuted?

A. Well, that was a comminuted fracture.

Q. Comminuted fracture. Will you give us your definition of a comminuted fracture?

A. A comminuted fracture is where [12] the fragments of the bones have multiple fractures although they might be very small. It isn't a

(Testimony of Dr. Hugh F. Dormody.)

simple. A simple fracture is just where the bone is broken off.

Q. In other words, the fracture is splintered with many——

A. Well, this is comminuted and compacted to a degree.

Q. Compacted?

A. Driven into itself, you see. And that's what split the distal fragment was having the shaft of the bone driven into the other.

Q. Do you have any other X-rays?

The Court: Offer that?

Mr. O'Donnell: I was going to offer both as one, Your Honor.

The Witness: Here's the same.

Mr. O'Donnell: Just one moment. At this time we will offer this X-ray as Plaintiff's Exhibit 1. Do you want to see it, Mr. Scholz?

Mr. Scholz: No.

The Court: Admitted. Plaintiff's Exhibit 1?

The Clerk: Yes, Your Honor.

Q. Have you any other X-ray, Doctor, of the same arm?

A. Yes, I have three of them, or two of them. One was the anterior-posterior view, on the other. This is the lateral view taken at the same time.

The Court: What was the other view?

The Witness: That was the anterior-posterior view. [13] This is the lateral view taken at the same time.

(Testimony of Dr. Hugh F. Dormody.)

Mr. O'Donnell: For the purpose of the record, I'll ask that this X-ray, which is the lateral view—

The Witness: Yes.

Mr. O'Donnell: —of Mr. Penders' left arm be introduced in evidence and marked Plaintiff's Exhibit 2.

The Clerk: Plaintiff's Exhibit 2.

Q. Have you another X-ray, Doctor?

A. X-rays here after manipulation and reduction show both the anterior-posterior views and the lateral views.

The Court: When was that taken?

The Witness: That was, the date on here is, this was taken on the 14th of May, 1946.

Mr. O'Donnell: I will ask that that be introduced in evidence and marked Plaintiff's Exhibit next in order. It will be Plaintiff's Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 in evidence.

Q. Now, Doctor, was Mr. Penders' arm put into a cast? A. It was put into splints.

Q. It was put into splints?

A. Metal splints, aluminum splints.

Q. Calling your attention to this object that appears, I presume, over the area——

A. That is——

Q. ——of the palm of the hand: will you tell us what that is? A. That's part of the splint.

Q. That's part of the splint?

A. That splint is designed to put his arm, his hand in extreme ulnar flexion for reducing the fracture of his radius.

(Testimony of Dr. Hugh F. Dormody.)

Q. I see.

A. In other words, his hand is turned out that way and this is a grip.

Q. Now, Doctor, how long—just sit down, Doctor.

(Clerk and witness placing viewer.)

Q. (Continuing): Just sit down, Doctor, if you will. Now, you say you applied splints to this wrist, is that correct? A. That's correct.

The Court: What was that last X-ray plate?

Mr. O'Donnell: Number 3, Your Honor.

The Court: What?

Mr. O'Donnell: Three.

The Court: Three, is it?

Mr. O'Donnell: Yes.

Q. And how long was Mr. Penders' left arm in that form of a splint, approximately?

A. Mr. Penders has had to wear a supporting splint to his arm up until very recently. I am not aware until recently, I mean, until today, that he has abandoned it.

Q. I see. Well, this form of splint that appears in the X-rays, particularly in Plaintiff's Exhibit 3, how long did that form of splint, was that kept on his hand or his arm?

A. Approximately three months, that particular type. [15]

Q. And then other forms of splints were applied after the removal— A. Yes.

(Testimony of Dr. Hugh F. Dormody.)

Q. —of that particular form of splint shown in the X-ray, is that correct?

A. That's correct.

Q. Now, Doctor, did you obtain a perfect union of the broken area, the arm?

A. No, the result obtained here is a very poor one, leaving the man with a permanent radial flexion deformity.

Q. And what is a radial flexion deformity?

A. If you could put the plates up so I could explain it to the people. Perhaps you know all these things but it seems rather difficult to be talking——

Q. Yes.

A. This' comminution here—if you want Mr. Penders to come up, I can demonstrate it—this break here, this portion which is broken off that you see here, the multiplicity of very fine fractures in it, practically completely absorbed, leaving him a shortening of this bone here with his wrist twisted clear over. You want me to show Mr. Penders' arm to the Judge?

Q. Yes. Mr. Penders, will you step up here a minute?

(Mr. Penders comes up.)

A. This piece here belongs in here and in this picture you can, his arm in reduction was in this position gripping this grip. However, because of this comminution here, the end of the bone, and his

(Testimony of Dr. Hugh F. Dormody.)

recuperative powers at his age being what they are, this piece of the bone absorbed leaving him approximately a half inch shortening between the [16] large radius and compared to the small bone of the forearm, the ulna, so he now has this radial flexion deformity, with his ulna protruding here to the side. It left him with that deformity and that's why the result isn't, is as it is, is because the bone actually absorbed. It wouldn't grow.

Q. Doctor, that condition of the wrist, as you have just shown the Court, that's a permanent condition, is it? A. That is permanent.

Q. Now, you stated that Mr. Penders also sustained a fracture of the left leg, was it?

A. Yes, knee.

Q. Were X-rays taken? A. They were.

Q. And what portion of the leg was shown to be fractured?

A. The left tibia into the knee-joint.

Q. I see, and, Doctor, what kind of a fracture was that? Was that comminuted?

A. That was a diagonal fracture.

Q. A diagonal fracture. And you caused X-rays to be taken? A. I did.

Q. —of Mr. Penders' legs? A. Yes.

Q. Leg, rather? A. I did.

Q. Have you those X-rays with you?

A. I have.

Q. I will ask you to step down here before—

A. Let me get these dates. (To reporter.) You don't mind me using your desk?

(Testimony of Dr. Hugh F. Dormody.)

Q. Now, just for the purpose of the record, you have shown us an X-ray here. What does that disclose? [17]

A. It is an X-ray of the left knee-joint showing the left femur coming down from the hip, the joint itself, the tibia and the fibula. And here you see a fracture running across the lateral surface of the tibia. You can see it going across there. It goes in at this point. It isn't very well demonstrated.

Q. Well, for the purpose of the record——

The Court: It is in the tibia, isn't it?

Mr. O'Donnell: Yes.

The Witness: That is in the tibia but continues involving the joint.

Mr. O'Donnell: Just a moment. I will introduce into evidence——

The Witness: That is the anterior-posterior view.

Mr. O'Donnell: ——Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's four in evidence.

Q. Have you any other X-ray?

A. This is a lateral view of the same thing showing just the, the lateral separation there below the knee.

Mr. O'Donnell: I will ask that this be introduced in evidence and marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 5.

The Court: Let me see that.

The Clerk: Yes, sir.

(Testimony of Dr. Hugh F. Dormody.)

The Court: Where is the fracture there?

Q. Will you point out the fracture to the Judge?

A. This [18] just shows the lateral view looking at it sideways. This is actually in profile. You can see it here, you see? But the anterior-posterior view shows the fracture running into the joint.

Q. Have you any other X-rays, Doctor, taken of the knee-joint?

A. No, they haven't, they haven't enclosed them here.

Q. Well, Doctor—

The Court: May I interrupt just a minute? That is Plaintiff's Exhibit 4 and 5, isn't it?

The Clerk: Yes, Your Honor.

Q. If you will sit down, Doctor. What treatment, Doctor, did you administer to the leg of Mr. Penders?

A. Well, the, the entire left extremity from just below the hip, including his knee and ankle and foot, were immobilized in a splint.

Q. And how long did you keep the leg in a splint, if you remember?

A. Approximately four months.

Q. Four months. And did you get a good union there?

A. Got a, a fair union with some hypertrophic changes in the joint which have given him a painful knee-joint.

Q. And will he continue to suffer pain in that joint from time to time in the future?

(Testimony of Dr. Hugh F. Dormody.)

A. Yes, he will always have a painful joint.

Q. Now, how long—before we get to that—Mr. Penders has a deficient right hand, is that correct?

A. He has a congenital anomaly of his right forearm and hand.

Q. I see. And how long was Mr. Penders confined to the hospital, [19] Doctor?

A. Until the 24th of March, 1947.

Q. And, Doctor, have you rendered a bill for your services rendered Mr. Penders?

A. Yes, we have bills for——

Q. And I show you here a statement of the Monterey Clinic and ask you whether or not you can identify that? A. Yes, I do.

Q. And what is that?

A. That's a bill for services rendered Mr. Penders during, from May 11, 1946, until March 24, 1947. It's a hundred, let's see, five, thirteen, seventeen hundred and thirty-five dollars total.

Q. I see.

Mr. Scholz: March 15?

Mr. O'Donnell: From May 11, 1946, to March 24, 1947.

Q. Doctor, in your opinion is this a reasonable charge for your services rendered? A. Yes.

Mr. O'Donnell: I will ask this be introduced in evidence——

The Court: What was the amount of that?

Mr. Scholz: Seventeen, thirty-five.

The Witness: Seventeen hundred, thirty-five.

(Testimony of Dr. Hugh F. Dormody.)

The Clerk: Plaintiff's Exhibit 6 in evidence.

Q. Now, I show you here a group of bills and ask you to examine them and tell us, if you will, Doctor, if the amounts mentioned therein for hospital services rendered Mr. Penders are reasonable.

Mr. Scholz: Well, I don't—I hate to object because [20] I don't want to be technical but I don't know if he knows that service was rendered. How can he testify to something unless he knows that service was rendered? I suggest this: that the witness let me see the bill and you and I go into conference and maybe we can stipulate. I mean I don't like to have testimony go in that is not competent.

The Court: Well, if the Doctor knows that the services were rendered, why, you can lay the foundation that way, can't you?

Mr. Scholz: That's right.

Q. Well, Doctor, you are connected with the Monterey Hospital, are you not? A. Yes, sir.

Q. And you are familiar with the charges at that hospital? A. Yes, sir.

Q. —for hospitalization services rendered, of all types? A. Yes, sir.

Q. I see. And have you looked at those bills?

A. Yes, sir.

Q. —that I have handed to you, and in your opinion would you say that those are reasonable charges? A. Those are reasonable charges.

The Court: And do you know of your own knowledge that those services were rendered?

(Testimony of Dr. Hugh F. Dormody.)

The Witness: Yes, sir.

Mr. O'Donnell: At this time I'll—subject to correction, we will run this up on the adding machine, and the [21] total of these bills is \$3,446.49.

The Court: Well, that is for Mrs.—

Mr. O'Donnell: No, this is for Mr. Penders.

The Witness: Hospital.

Mr. O'Donnell: Yes, hospital bill. I am confining myself to Mr. Penders.

Mr. Scholz: 3446.

Mr. O'Donnell: 49. And I will ask that these bills be introduced as one exhibit, if the Court please.

Mr. Scholz: Object on the grounds of no proper foundation being laid.

The Court: Objection is overruled. What's the amount of that?

Mr. O'Donnell: \$3,446.49.

The Clerk: Plaintiff's Exhibit 7 in evidence.

The Court: Is that seven?

The Clerk: Yes, Your Honor.

Q. Now, Doctor, you have testified that—if I understood you correctly—that Mr. Penders suffered a head injury also?

A. He had a concussion at the time that he came in.

Q. And will he suffer any permanent effects from that in your opinion? A. No, sir.

Q. He will not. And he will not suffer any permanent effects from the contusions and abrasions

(Testimony of Dr. Hugh F. Dormody.)

that you found in and about his body at the time that he was first brought into the hospital? [22]

A. No, only those to his wrist and knee are permanent.

Q. I see. Doctor, on the same day—that is, May 11, 1946—did you see Mrs. Flora Penders?

A. I did.

Q. And where did you first see her?

A. Saw her in one of the emergency rooms in Monterey Hospital.

Q. And did you make an examination of Mrs. Penders at that time? A. I did.

Q. And would you tell us what you ascertained from your examination of Mrs. Penders at that time?

A. At that time Mrs. Penders, that, I saw her on the evening of May 11, 1946, she was unconscious.

The Court: Did you see her at seven p.m. at the same time you saw the——

The Witness: Well, that's the time they come in, about the same time.

Q. Did you administer any aid to her at that time, Doctor? Oh, pardon me; I see you are familiarizing yourself with the——

A. She was unconscious and in a deep state of unconsciousness due to shock. She had certain indications that she might have intercranial damage to the extent of a skull fracture. She had a rigid abdomen, very difficult breathing and a badly comminuted fracture of the left femur.

(Testimony of Dr. Hugh F. Dormody.)

Q. And confining yourself, Doctor, to the fracture of the left femur: what, if anything, did you do towards the treatment of that injury?

A. We immobilized the femur. [23]

Q. And did you cause X-rays to be taken prior to the immobilizing of the femur? A. We did.

Q. Have you those X-rays with you?

A. I have.

Q. I will ask you if you would step down here to the light again and show us those X-rays?

A. Get these in order. A temporary splint was applied to this, Mrs. Penders' leg to immobilize her femur, immobilize her entire left lower extremity. Because of her unconscious state, X-rays were not taken, until the 13th of May.

Q. That was two days after you saw her?

A. Yes, sir.

Q. Was she unconscious all that time, Doctor?

A. She was in shock all the time. She gradually regained consciousness the first twelve hours hospitalization. This is a picture taken at that time. Anterior-posterior view.

Q. You are now giving us an anterior-posterior view of the—what portion of the leg of—left leg of Mrs. Penders?

A. The—that is a picture in, showing the left knee-joint and the lower third of the left femur as well as the joint and the left tibia and fibula, showing a diagonal fracture here, fracturing off the external condyle of the left femur into the knee-joint.

(Testimony of Dr. Hugh F. Dormody.)

Q. And did you take any——

Mr. O'Donnell: Just pardon me a minute. I will introduce in evidence and have marked Plaintiff's Exhibit next in order.

The Court: Eight. [24]

The Clerk: Plaintiff's Exhibit 8.

Q. Now, do you have any other X-ray, Doctor?

A. I have a lateral view of the left lower extremity.

Q. And will you point out on that where the fracture is shown to exist?

A. This shows the shaft of the femur coming down. It is very badly comminuted at this point. It is dislocated anteriorly over the distal end of the femur giving this different direction here. The shaft is practically resting on the top of the femur end of the left knee-joint.

Mr. O'Donnell: I will ask this be introduced in evidence and marked Plaintiff's Exhibit 9, I believe?

The Clerk: Yes, sir. Plaintiff's Exhibit 9 in evidence.

Q. In addition to this X-ray, Doctor, have you any other X-rays?

A. I have a series of X-rays taken here showing a, the method of reduction and application of skeletal traction. You want them all introduced as—unfortunately, they are not in order but it shows approximately what happened.

(Testimony of Dr. Hugh F. Dormody.)

Q. Well, I don't think we need any other X-rays, Doctor. A. This shows——

Q. You have another X-ray? Just for the purpose of the record, we want to keep the record straight, see.

A. This is the anterior-posterior view showing the fractures here of this, the shaft of the femur being driven between, into the distal fragment, splitting it in two, so as the shaft was driven [25] down, it separates in these two directions. This shows a Kirschner wire through the tibia, which was used for skeletal traction to pull this fragment away from this. There was counter-pulling at the hip which doesn't show on this picture.

The Court: That's what you call traction, isn't it?

Q. Well, you put her in traction, didn't you, Doctor? A. Yes.

Q. I see, Doctor.

The Court: That is Exhibit 10?

Mr. O'Donnell: That is Exhibit 10, yes, sir.

The Court: What's the date of that?

The Witness: That was on the 17th.

Mr. O'Donnell: Of May, 1946.

The Witness: Well, we can find the 17th here and I'll show you. Here is a later one.

Q. You have another X-ray, Doctor?

A. Lateral view taken on the same date.

Q. That is, the 17th of May, 1946?

A. Yes. Skeletal traction is in the tibia with

(Testimony of Dr. Hugh F. Dormody.)

counter-traction at the hip-joint showing the fragments here pulled into pretty good position as the traction is applied, the shaft held in position, the distal fragment, and any articulation is being rotated anteriorly in fair position, showing at this same time the more extensive fractures that didn't appear in the first picture.

Q. Now, how long—you can take the——

Mr. O'Donnell: Well, let me put [26] this in evidence. That would be 11, would it?

The Clerk: Plaintiff's Exhibit 11.

Q. All right, Doctor. You can pick these up afterwards, if you don't mind? A. All right.

Q. Now, how long, Doctor, did Mrs. Penders continue in traction?

A. I have some of my papers over here.

The Court: I didn't hear that question.

Mr. O'Donnell: I say, how long did she continue in traction?

A. She was held in traction approximately six months.

Q. Six months? A. Yes.

Q. And how long did she remain in the hospital, Doctor?

A. She remained in the hospital at that time until the 24th of March, 1947.

Q. And at that time did she go home?

A. At that time she was taken home in an ambulance under the care of practical nurses too, because of the, Mr. Penders being unable to cope with these hospital expenses and medical expenses. She wasn't

(Testimony of Dr. Hugh F. Dormody.)

in any stretch of the imagination well enough to go home.

Q. Was she subsequently returned to the hospital?

A. She was brought back to the hospital April 17th.

Q. Of 1947? A. Yes.

Q. I see. And did you have occasion to examine her at that time? A. I did.

Q. And what condition did you find to exist?

A. She was, [27] she had a lobar pneumonia. She was unconscious and in a state of coma.

Q. And she remained in the hospital from April, 1947, up until the time of her death, is that correct?

A. Yes. Yes, sir.

Q. And during that period of time I just mentioned, what was her condition? What were her ailments? A. Well, I would like to explain.

Q. You may, Doctor.

Mr. Scholz: I think you ought to answer the question first, Doctor.

The Witness: What is it?

Mr. Scholz: I think, if Your Honor please, I think he should answer the question first.

The Court: What was the question? Will you just read the question? (Question read.) Can you answer the question?

The Witness: I can.

A. At the time of the injury, she had severe internal injuries both to her chest and to her kidneys. Her urine was full of blood and from that

(Testimony of Dr. Hugh F. Dormody.)

condition in her kidneys, she had not recovered at the time she left the hospital. She had very poor kidney function. Her bleeding lasted during the first six weeks of her hospitalization from her original injury and left her with a great deal of kidney damage, so much so that she had at times a high accumulation of nitrogenous waste products in her blood stream and she had to be guarded very carefully dietetically [28] to keep her from going over into a state of uremia. That was the condition that was a direct result of her injuries and the condition that she was in more or less during her entire period of time of hospitalization from the time of her original injuries up until the time of her death.

Q. I see. And can you attribute this kidney condition which existed from the day of the accident to the accident itself?

A. The only kidney condition that she had at the time I saw her was, as a direct result of the accident because it was an acute hemorrhagic thing.

Q. And that condition continued to exist—perhaps alleviated a wee bit—up until the time of her death?

A. During the remainder of her lifetime.

Q. I see. And also you say you found injury to her lungs? Did I understand you correctly?

A. She had a bad compression of her chest at the time she came in. She had an acute passive congestion of both lung fields. Because of the seriousness of this woman's injuries, it was never

(Testimony of Dr. Hugh F. Dormody.)

possible at any time to move her into the X-ray department for thorough X-raying. These are portable pictures taken in her room in her bed so skull pictures were never taken and satisfactory pictures of her lungs were never secured.

Q. And when she returned in April of 1947, she remained there up until the time of her death last Sunday, is that correct?

A. That's right. [29]

Q. And during that entire period of time she was under your care?

A. Under my care and she has never, since the time she was hurt.

Q. She has been under your care since the time she was hurt. And, Doctor, can you attribute the death of Mrs. Penders to the injuries she sustained in this automobile accident on May 11, 1946?

A. The direct cause of death was due to the injuries.

The Court: Was this lobar pneumonia and unconsciousness of hers, for which she was brought back to the hospital, caused by this injury, too?

The Witness: Well, she was in this deep state of depletion and, so that she shouldn't have gone home. The transporting her undoubtedly was a contributing factor. That would probably not have occurred had she remained in the hospital. But she was taken out of the hospital against my advice and I was, of course, sorry to have it all happen because she was in no condition to be removed from

(Testimony of Dr. Hugh F. Dormody.)

the hospital and placed under the care of a practical nurse in the home. It was one of those things where it just happened because of the economic situation.

Q. Now, have you rendered a statement, Doctor, for the services performed on Mrs. Penders' behalf? A. I have.

Q. And I show you here a ledger sheet of the Monterey Clinic and ask you whether or not you can identify that ledger sheet?

A. These, these are the charges that I submitted to the hospital. I have verified all of the original charge slips yesterday and [30] this—

Q. And what was the total amount of your charge for your services?

A. The total amount of my charge for my services is \$4,465.

The Court: That is for your services on Mrs. Penders?

The Witness: Yes, sir; that's the Monterey Clinic.

Q. And you are the Monterey Clinic?

A. Well, I have seen her and other people have seen her but that is the total charge. I made all the charges.

Q. You made all the charges, and, Doctor, is that a reasonable charge for the services that were rendered? A. Yes, sir.

Mr. O'Donnell: I will ask that this ledger sheet be introduced in evidence and marked Plaintiff's Exhibit 12.

(Testimony of Dr. Hugh F. Dormody.)

The Clerk: Twelve.

The Court: Is that the service from May 11 up until the death?

Mr. O'Donnell: Until the death, yes, Your Honor.

Q. I show you here a package of bills and ask you—the bills being statements from the Monterey Hospital—and ask you to examine them and tell us whether or not in your opinion as a member of the staff of the Monterey Hospital that is a reasonable charge for the hospital services rendered Mrs. Penders for the period covered therein, that is, namely, from May 11, 1946, to April 10, 1949?

A. Yes, sir.

Mr. O'Donnell: I will ask that these bills be introduced as Plaintiff's Exhibit 13. [31]

The Clerk: Thirteen.

Mr. O'Donnell: And subject to correction, the total amount of the bills as we have added them up on the adding machine is \$12,942.19.

Mr. Scholz: Objection on the ground that the proper foundation has not been laid.

The Court: Well, the witness here is, has already identified the bills as being reasonable. Let me ask you this: Do you know of your own knowledge that the services stated in those bills were performed by the hospital?

The Witness: I do, and I can also explain why I know they are reasonable. Because of the economic situation, I negotiated with the business

(Testimony of Dr. Hugh F. Dormody.)

manager of the hospital to render private-room services to Mr. Penders' wife at ward-room rates, and I was responsible for that and kept in touch with him at times so I know they are reasonable. And those are the bills that he paid.

The Court: Objection is overruled and it will be admitted, Exhibit 13.

Mr. O'Donnell: You may take the witness stand.

The Court: What's the amount of those bills?

Mr. Scholz: Doctor——

Mr. O'Donnell: Just one——

The Clerk: \$12,942.19.

The Court: 42, 19? [32]

The Clerk: Yes, sir.

Mr. O'Donnell: Does Your Honor want to take a recess at this time or do you want to go on?

The Court: Yes. I think it would be well for the reporter.

Mr. O'Donnell: Yes.

The Court: Ten minutes.

(Recess, 11:00 to 11:12 A.M.)

Cross-Examination

By Mr. Scholz:

Q. Doctor, were you at the Monterey Hospital when Mr. and Mrs. Penders were brought there?

A. I was.

Q. Did you make out the report out at the hospital of their injuries? A. Yes, sir.

Q. Didn't it show that Mr. Penders had a frac-

(Testimony of Dr. Hugh F. Dormody.)

tured left wrist, sprained left knee, and cut over the right side of the head?

A. The report shows that he had, he was in shock. He had a fractured left wrist, fractured left tibia, and the knee-joint.

Q. That is the left knee, isn't it?

A. Yes. Multiple contusions, abrasions and lacerations of the face, hands, trunk, lower extremities.

Q. In other words, he had contusions: that means bruises and so forth? A. That's right.

Q. And that was all the injuries shown to him at that time as a result of this accident? Now—

Mr. O'Donnell: Better answer "yes" or "no," Doctor, [33] so the reporter—

Mr. Scholz: I thought he—

The Witness: That's my report, yes.

Q. Now, Doctor, Mrs. Penders showed a sprained left knee? A. No.

Q. What did the—you made out a report for the Monterey Hospital, too, on Mrs. Penders?

A. I have it right here.

Q. What does that show?

A. Unconscious due to concussion, possible fractured skull, internal injuries, comminuted fracture of the left femur.

Q. And it developed that she did have a—well, the left femur, that runs into the knee, doesn't it?

A. That's right.

Q. In ordinary parlance, we would call it an

(Testimony of Dr. Hugh F. Dormody.)

injury to the knee, not ordinary parlance but——

A. No, it is not. It is a fracture of the femur into the knee-joint.

Q. She had no fractured skull or anything of that kind?

A. In my opinion she had a fractured skull, that is, I thought possible fractured skull.

Q. But the preliminary report was that she had no skull fracture?

A. X-rays were never taken to confirm the fact. She was unconscious the first twelve hours while in the hospital.

Q. And no X-rays were taken of that from the time she went in until the time she died?

A. She was never sufficiently recovered from her original injuries to be subjected to complete skull plates. [34]

Q. Well, Doctor, do you mean—you mean to say that her injuries were such that an X-ray could not be taken of her head?

A. Complete skull couldn't be taken. I can explain that, if you wish.

Q. You might.

A. She had a very severe comminuted fracture of her femur, as shown. She was in the extension. In order to get complete skull plates, you have to turn people, in order to take the anterior-posterior; you have to turn them on the side, to take the lateral; you have to turn them on their face, to take them through the back of their head. A com-

(Testimony of Dr. Hugh F. Dormody.)

plete skull necessitates about twenty pictures in different positions in order to identify any fractures that might exist and with a woman in extension and with, you know she was in a semi-comatose condition, it was impossible to move her around to that extent without doing great damage to her. It was not taken because it was felt that her other injuries were of more major importance and they should be treated first.

Q. In other words, you did not rule out the possibility of a skull fracture but you felt that it was not sufficiently important to take away any care that might be given to the other, femur?

A. That's right.

Q. And Doctor, she was 69 years old, Mrs. Penders, at the time of the accident?

A. The age given her on my report is 79.

Q. 79 I mean. Did I say 69? [35]

Mr. O'Donnell: Yes.

Mr. Scholz: I'm sorry. Oh, I got 69.

Mr. O'Donnell: No, it's 79.

The Witness: It might have been 69 or 79. This, of course, is hearsay. We got this from the only person who was conscious out of the four people in the car and she thought Mrs. Penders was 79 when I spoke to her and asked her age.

Q. Well, anyway, she was a very elderly woman?

A. I never confirmed her age either.

Q. You are a tactful man, Doctor. And Mr. Penders was 82 years old?

(Testimony of Dr. Hugh F. Dormody.)

A. Oh, I beg your pardon. That is Mr. Penders, was 79.

Q. Oh, yes, that's right.

A. Mrs. Penders was 77.

Q. That's right. That's better. Mr. Penders at that time was 79 years of age. Correct?

A. That's right.

Q. And, of course, the calcium in the bones, the bones become more brittle as you get older, is that correct?

The Court: What is that? I didn't hear.

Mr. Scholz: Pardon?

The Court: I didn't hear your question.

Mr. Scholz: I say the calcium decreases and the bones become more brittle as you grow old.

The Witness: Are you asking me or telling me?

Mr. Scholz: It's an oratorical question, Doctor. You may answer that. It's really a question. I'm not a doctor. [36]

A. Well, it's true that the healing process at older ages is not as astute as it is at younger ones, if that answers your question.

Q. And the injured, fractured leg of Mr. Penders was immobilized in four months, is that correct? A. That's right.

Q. And, Doctor, were you at the hospital every day from May 11, 1946, to May 24, 1947?

A. Pardon me. I was. I lived there.

Q. Now, Doctor, Mrs. Penders left the hospital on May the 24th, 1947, according to your statement.

(Testimony of Dr. Hugh F. Dormody.)

I think you will find my statement is true. Is that correct?

A. She left the hospital on the 24th of March, 1947?

Q. That's right. And then when she came back, she had pneumonia?

A. I think she left the hospital on the 25th of March.

Mr. Scholz: Well, you told me the 24th of March, Mr. O'Donnell. All right, it makes not much difference. 25th of March, she left the hospital on the 25th of March according to your records?

The Witness: That is correct.

Q. And when she returned on April 17, 1947, she had pneumonia? A. Yes, sir.

Q. Now, that could have developed during the period that she was home?

A. Well, it, it, develop during the time from the time she left the hospital until she returned?

Q. Yes. In other words, an elderly person like that can get pneumonia and it can develop very quickly, can't it? A. Yes. [37]

Q. And then with proper care, in other words, if you see the pneumonia patient immediately and inject penicillin, you can stop it within a week?

A. Well, her pneumonia was a combination of factors. It was a pneumonia superimposed upon a more or less chronic passive condition of her lungs due to a threshold uremic state and definite cardiac

(Testimony of Dr. Hugh F. Dormody.)

factor from being in bed in traction for over a year, you see.

Q. I know, but it is still pneumonia, isn't it, no matter what causes it?

A. Well, yes, but your question was with regard to penicillin. There are only certain types of pneumonia that penicillin is effective on.

Q. Well, then, I understand, Doctor, that penicillin wouldn't have been effective in this case?

A. Could have only been effective in the event that there were certain organisms that respond to penicillin independently, superimposed upon the pre-existing condition.

Q. Doctor, you are arguing the difference with me. I asked the question: Is it your statement that the penicillin wouldn't have been effective in this case?

A. Penicillin was given in this case and did have some beneficial effect.

Q. How soon after the pneumonia developed, was this penicillin given?

A. It was given on the 17th when she returned to the hospital.

Q. And you don't know the date that developed?

A. The pneumonia? [38]

Q. Yes.

A. Not the complete consolidation.

Mr. Scholz: That's all, Doctor.

(Testimony of Dr. Hugh F. Dormody.)

Re-Direct Examination

By Mr. O'Donnell:

Mr. O'Donnell: I just want to ask the Doctor one more question about another X-ray, and I will ask leave at this time, Your Honor——

The Court: All right.

Mr. O'Donnell: ——as part of my case.

Q. Doctor, was any X-ray taken after the removal of the traction? A. Yes.

Q. ——from Mrs. Penders' leg? A. Yes.

Q. Have you a picture here?

A. Yes, I have. These show very nicely what counsel is trying to bring out. Decalcification has taken place. This——

Q. Just for the purpose of the record you have an X-ray here and what does that X-ray disclose?

A. This anterior-posterior view of the left femur and the knee-joint.

Q. When was it taken, Doctor?

A. That was taken on the 31st of January, 1947.

Q. And that was taken after traction was removed?

A. That was taken after the traction was removed, at the time the traction was removed.

The Court: What was that date again?

The Witness: January 31, 1947.

Q. And will you tell us what that X-ray discloses, Doctor? [39]

A. The X-ray shows the degree of union that has taken place. This is new bone thrown down

(Testimony of Dr. Hugh F. Dormody.)

here. It shows that these two fragments, the split of the distal fragments, the two halves are in good position. The contour of the knee-joint from, from external, externally was without deformity.

Mr. O'Donnell: I see. And I would like to ask that this be introduced in evidence and marked——

A. (Continuing): It also shows a, a moth-eaten appearance of the bone here which is due to, to a condition known as osteoporosis or re-absorption of the calcium that is laid down in the bone leaving just a fibrous structure in there.

Mr. O'Donnell: I will ask that it be introduced in evidence and marked Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 14 in evidence.

Q. Do you have another X-ray, Doctor?

A. Yes.

Q. And when was that taken?

A. Taken the same date and is the lateral view of the left knee-joint and left femur showing the old fracture with a great deal of, of absorption of calcium leaving what is commonly spoken of as an egg-shell type of bony structure.

Mr. O'Donnell: Now, I ask that this be introduced in evidence, may it please the Court, and marked Plaintiff's Exhibit 15.

The Clerk: Plaintiff's Exhibit 15.

A. (Continuing): The other important thing is, here is practically [40] complete loss of cartilaginous surface to the weight-bearing area of the

(Testimony of Dr. Hugh F. Dormody.)

knee-joint with ankylosis of the knee-cap to the lower end of the femur.

Q. Tell me, Doctor, can you tell us: Would Mrs. Penders have been able to walk on that leg again?

A. I doubt it very much. I think the leg would have collapsed, at least any turn or twist or slight torsion due to trauma would have caused it to re-fracture.

Mr. O'Donnell: Any further questions?

Mr. Scholz: Yes.

Mr. O'Donnell: Will you step up to the witness stand again, Doctor?

Re-Cross-Examination

By Mr. Scholz:

Q. Couple more questions, Doctor. Doctor, you, of course, got a medical history of Mrs. Penders, did you not? A. Yes.

Q. And what did her medical history show?

A. The only thing of importance in her medical history, as I recall now—I haven't it with me—was that many years previously, while a resident here in San Francisco, she had had some trouble with her rectum and hemorrhoids and approximately twenty-five years prior to the time I saw her, she had been treated here for some trouble with her cervix and radium emanation seeds, I believe, had been used in the treatment of a cervical condition that she had.

Q. Doctor, would you mind sending that report to Mr. O'Donnell [41] and let me see——

(Testimony of Dr. Hugh F. Dormody.)

A. I was under the impression that he had it.

Mr. Scholz: Oh, have you got it?

Mr. O'Donnell: No, I haven't. I haven't got it,

Doctor.

Q. Would you do that so you won't have to come up again?

A. Yes, I can write it all down for you right now.

Q. Well, I would like to see the written report.

A. Those are the complete highlights to her condition.

Q. Would you do that, Doctor, then?

A. Very glad to.

Mr. O'Donnell: That's all.

Q. Did you also get a medical history of Mr. Penders?

A. Only highlights of his lifetime in which the only thing of importance was the fact that he had had this congenital anomaly of his forearm and hand but he had been essentially a healthy and well man all his life.

Q. That was rather a quick recovery, considering his age, I mean the treatment to the leg, wasn't that, Doctor?

A. I think he is in remarkably good health now for his age but that he does have these two things which constitute a disability which will not improve. He will have those the rest of his life.

Mr. Scholz: That's all, Doctor.

Mr. O'Donnell: That's all, Doctor. That is all.

(Witness excused.) [42]

Mr. Scholz: Does Your Honor wish me to make a brief opening statement now?

The Court: Yes, I would like to hear it to get the facts of the case.

Mr. Scholz: At this time, Your Honor, we will stipulate that the driver of the Government car was acting in the line of duty. I think we denied it in our answer, did we not? At the time I filed the answer, we did not have all the information. But that is the fact that he was acting in the line of duty, which means, of course, in the scope of his employment.

The Court: In other words, it's stipulated that the driver of the car, of the United States car was acting within the line of duty and within the scope of his employment.

Mr. Scholz: The Government vehicle was going west towards Monterey on Fremont Street. He was traveling approximately 35 to 40 miles an hour, and in the outer lane. Just prior to the impact, Mr. Penders, who was driving a green sedan, I think a Hupmobile 1934, was driving east on Fremont Street or Fremont Extension, they call it, too, and on the wrong side of the highway. He had crossed over from the south side of Fremont Street over to the north side of Fremont Street approximately a hundred feet before he reached this intersection and was traveling on the wrong side of the street at the time that the Government vehicle or driver saw [43] him and that the Government driver, of course, did all he could to avoid a collision

and could not do so, that the collision of the two automobiles happened approximately here. In other words, before——

Mr. O'Donnell: Indicating—indicate for the purpose of the record, will you?

Mr. Scholz: On the diagram—which I think we ought to offer for identification purposes at this time, unless you want to stipulate?

Mr. O'Donnell: It can go into evidence.

Mr. Scholz: Yes. May I interrupt, Your Honor, by offering this diagram in evidence and mark it Defendant's Exhibit——

The Court: Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A in evidence.

Mr. Scholz: Referring to Defendant's Exhibit A, the collision occurred at, approximately at the spot that's designated on the diagram as "edge" being part of the words "edge of the pavement." That is the defense in brief. Of course, there will be a great deal more extenuating, I mean circumstances that we offer but that is the defense.

Mr. O'Donnell: Now, may it please the Court, we practically have the Monterey Police Department here with us today and I was just wondering if I could call some of those officers out of order so that we can get them back on their [44] jobs.

The Court: Yes, I would like to say this in that connection, that I have to be in Oakland at four, so I was going to ask you gentlemen when we recess at twelve that, if it is convenient, we come back at

one-thirty because I would like to leave here at three-thirty.

Mr. O'Donnell: That's fine.

CHARLES E. SIMPSON

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles E. Simpson.

The Clerk: Thank you.

The Court: Charles E. what?

The Clerk: Simpson.

The Witness: Simpson. S-i-m-p-s-o-n.

Direct Examination

By Mr. O'Donnell:

Q. And, Mr. Simpson, you are a member of the Monterey Police Force? A. Yes.

Q. And serving in the capacity of sergeant, is that correct? A. Yes, sir.

Q. And were you a duly-appointed and acting member of the Monterey Police Department on May 11, 1946? A. Yes.

Q. And calling your attention to approximately seven o'clock on [45] that day, were you called to Fremont Avenue and Park Avenue in Monterey?

A. Yes, I was.

Q. And upon arriving there, would you tell us what you observed, if anything?

A. I observed two vehicles that had been in a

(Testimony of Charles E. Simpson.)

collision and I observed a white ambulance that was leaving the scene just as I arrived.

Q. I see, and after arriving at the scene of this particular accident, what, if anything, did you do?

A. I was called to the scene by Lieutenant Marinello for the purpose of taking photographs of the vehicles that were at the scene that had been in the collision.

Q. And did you take your photographs, any photographs at that time? A. Yes, I did.

Q. Have you brought those photographs with you? A. Yes, sir.

Q. I will ask you to compare the photographs that I have handed you with those in your possession—and, incidentally, those that are in your possession, are the official records of the Monterey Police Department?

A: Yes, sir, I am the superintendent of records for the department.

Q. I will ask you whether the large copies I have handed you are true and correct copies of those in the possession of your department?

Mr. Scholz: May I shorten this? I have some copies here I think were taken by you, Sergeant, and can he compare them? I think we can stipulate to them. [46]

Mr. O'Donnell: Oh, fine.

A. Yes, all right, fine. They are the same here, each for each enlargements and the small copies which are our official record.

(Testimony of Charles E. Simpson.)

Mr. Scholz: Now, this one, I have that one, I have that one.

A. (Continuing): I have the negatives here that were taken at the time. Different distances, same view.

Mr. Scholz: This one I have. These are the same, aren't they?

The Witness: Now, these are.

Mr. Scholz: No, they are not.

The Witness: They are not taken at the same time. They are taken at a slightly different distance.

Mr. Scholz: I have copies of the print of the negative on that and I'll stipulate——

Mr. O'Donnell: They are all correct.

Mr. Scholz: They were taken at that time, taken by the sergeant.

Mr. O'Donnell: Yes. Let's take these in order.

The Court: Were you a sergeant of police at the time you took the pictures?

The Witness: Not at the time.

The Court: What was your rank then?

The Witness: I was a police officer.

The Court: Police officer. [47]

Q. I show you here a photograph and ask you if you took that photograph? A. Yes, I did.

Mr. O'Donnell: May I? Just for the purpose of the record, if I may, I'll ask this be introduced into evidence for identification. It can go into evidence, I guess, and be with the stipulation.

(Testimony of Charles E. Simpson.)

The Court: Why don't you introduce all of them as long as you have them?

Mr. O'Donnell: As one exhibit?

The Court: I understand——

Mr. O'Donnell: I was going to explain these different——

The Court: Oh, I see. Then I guess you better introduce one at a time. Otherwise, you want to explain——

Mr. Scholz: What exhibit is it now?

Mr. O'Donnell: This is Exhibit 16.

The Clerk: Exhibit 16 in evidence.

Q. Showing you Plaintiff's Exhibit 16, I'll ask you to tell us if you took that picture and, if so, what the same portrays?

A. Yes, I took that picture. Your Honor, may I refer to my original notes made at the time concerning these photographs?

The Court: Yes.

A. (Continuing): In my notes, I state that I took one of the start of the skidmarks, a time exposure from 40 feet. This series of photographs I started at 6:50 p.m. This was the first of the photographs, as I recall, and was made under conditions of some light. Photograph was intended to show the——

Q. Skidmarks?

A. Pavement at the beginning of the skidmarks, the general area of the beginning of the skidmarks.

Q. Can you point out to us whether or not any

(Testimony of Charles E. Simpson.)

skidmarks appear upon the face of that photograph?

Mr. Scholz: I object to that on the ground that the photograph is itself the best evidence as to whether any skidmarks appear on there, not his testimony.

The Court: Well, let me see that for a moment, will you?

The Witness: Yes.

The Court: Would you point out to me what you refer to as skidmarks in this?

The Witness: Yes, Your Honor.

Mr. O'Donnell: You will have to talk a little louder, Sergeant.

The Witness: The skidmarks in the photographs are evidenced by these dark lines that are broken in character, commencing here, extending to here, then a break, then here, then here again and then here.

Mr. Scholz: Now, for the purpose of the record, may I interrupt? I'm sorry. Are you indicating that those skidmarks are along that white line there? Is that the one?

The Witness: They are approximately parallel to the centerline, marking. [49]

The Court: Is that white line the centerline, the nearest one to the skidmarks?

The Witness: This is the centerline. The one nearest to the skidmarks is a dividing strip between the centerline and the north curbline.

(Testimony of Charles E. Simpson.)

The Court: Yes. Can you show me on that diagram where that picture was taken?

The Witness: Yes. (Witness steps down.)

Mr. O'Donnell: Have you a pencil?

The Court: This is Exhibit 16, isn't it?

Mr. Scholz: Yes, Exhibit 16, Your Honor.

The Clerk: Yes, sir.

The Witness: The camera was set up about the end of this white marking strip and pointed in this general direction. The pole noted here, you will refer, appears in the righthand edge of the photograph. That is this pole. The camera was turned in this general aspect.

Mr. Scholz: The pole that is indicated——

The Witness: The pole that is indicated on the map is the pole that appears in the photograph at the extreme right.

Q. For the purpose of the record, you better mark this pole "S-1". You are facing in a south-east direction, is that——

A. Yes, that's right, the camera was pointed approximately southeast. [50]

Q. And at the time the photograph was taken, your camera was in this position? A. Yes.

Q. Marked "S-2".

Mr. O'Donnell: Does that answer your query, Your Honor?

The Court: Yes.

Mr. O'Donnell: All right. Fine. Now, I want

(Testimony of Charles E. Simpson.)

to introduce this photograph in evidence and mark it—

The Clerk: Plaintiff's Exhibit—

Mr. O'Donnell: Plaintiff's Exhibit 17, isn't it? I will give it to you in a minute. That's it.

Q. I show you this photograph and ask you whether or not you can identify that picture?

A. Yes. This is one of the photographs which I took at the scene.

Q. Referring to your notes, can you step up again to the map and show us where you had your camera placed at the time that you took that particular photograph?

A. (Witness steps down): My notes indicate the positioning of the camera in relation to the vehicles, not in relation to the intersections. I may, I am a little loath to position the camera accurately without informing Your Honor of that fact. I have measurements from the camera to the vehicles. If I attempt to place the camera exactly accurately, I will then be in a position of placing the vehicles which I am not able to do from my measurements.

Q. All right. From that photograph—I will withdraw my question [51] until it meets with the approval of the Court—from that photograph, can you point out on the map the position of these two cars at the time that photograph was taken?

A. The Penders vehicle was approximately here.

Q. Will you mark it with a pencil, Sergeant? Here is a pencil.

A. Yes.

(Testimony of Charles E. Simpson.)

Q. If you will.

The Court: What's that? The defendant's vehicle?

Mr. O'Donnell: No, Penders vehicle; that is the plaintiff's vehicle.

The Witness: Penders.

Q. Well, we will mark that "S-3" and that is the position of the Penders automobile as shown in Plaintiff's Exhibit Number 17, is that correct?

A. That's correct to the best of my recollection.

Q. Now, will you show us the position of the Government vehicle upon this map as shown by that photograph?

Mr. Scholz: I suggest that you designate that.

Mr. O'Donnell: Yes, "S-4".

Q. Now, I have noted that you have put the Government vehicle over the white marker on the westbound traffic on the north side of the highway?

A. That may be, that may be due to an interpretation of the scale. My recollection is that the rear of the vehicle was approximately in the center of that particular lane rather than extending over the—— [52]

The Court: You mean the rear of the Government vehicle?

The Witness: The rear of the Government's vehicle.

(The Court steps down.)

The Witness: As approximately indicated there.

Q. All right, that's——

(Testimony of Charles E. Simpson.)

The Court: This "S-4", that arrow indicates the——

The Witness: The direction.

The Court: The same with "S-3"?

The Witness: Yes, sir.

(The Court returns to bench.)

Mr. O'Donnell: I will introduce this into evidence and mark it, this photograph, and it will be marked——

The Court: Eighteen.

Mr. O'Donnell: Eighteen. Plaintiff's Exhibit 18.

The Clerk: Eighteen in evidence. Have you got 16 there?

Mr. O'Donnell: Did he have sixteen?

The Clerk: Never mind. I'll get it later.

Q. I show you photograph marked Plaintiff's Exhibit No. 18 and ask you if that is a photograph, one of the photographs you took on that particular evening?

A. Yes, I took this photograph.

Q. And calling your attention particularly to where one of the officers is writing: what is he writing on?

The Court: I didn't see that seventeen.

The Clerk: I'm sorry. [53]

Q. What is that object on which he is writing?

A. I believe that is a portion of the front seat of the Government vehicle.

Q. I see. Now, when you were there, did you observe whether or not the seats were thrown out of the vehicles?

(Testimony of Charles E. Simpson.)

A. The seat was on the pavement.

Q. And do you know the other officers, the names of the officers appearing in that photograph?

A. Yes, the officer writing on the paper, on the seat is Lieutenant Marinello and the officer holding the end of the tape, appearing in the left of the picture, is Officer Davenport, and the officer walking with the flashlight was Officer Betancourt.

Mr. O'Donnell: I would like to introduce another photograph, may it please the Court?

The Clerk: Plaintiff's Exhibit 19 in evidence. Those are all of them.

Q. All these photographs were taken there approximately the same time, just from different places?

A. They were taken one immediately after the other.

Q. I see. Now, I am going to ask——

Mr. O'Donnell: Does Your Honor want to see this before I question the witness?

The Court: Yes. That object there in front of the Penders automobile is a seat from the Government automobile?

Mr. O'Donnell: I think it's out of the Penders car, Your Honor. That's out of the Penders car. Here's the [54] Government, see, the jump seats?

The Court: Yes.

Q. Now, I will ask you to step down to the map again with your notes, if you will, Sergeant?

A. Yes. (Witness steps down.)

(Testimony of Charles E. Simpson.)

Q. And referring now to Plaintiff's Exhibit No. 19, are you in a position to show us the position where your camera was when that was taken?

A. My notes indicate that was taken facing the left side of the vehicles from Fremont Street looking east at a distance of about 25 feet.

Q. Would you mark on the map just where that would be? Want the ruler?

A. That's all right.

Q. We will mark that "S-5". Now—

Mr. Scheitz: "S-5" indicates the position your camera was when you took Exhibit 19?

Mr. O'Donnell: Nineteen, yes.

Q. Now, Exhibit 19, would you mark out on the map here the position of those cars as shown by that exhibit?

The Court: Is that—

Mr. O'Donnell: That's nineteen, yes.

A. By reducing the scale somewhat, at about that, the cars were virtually, not actually in physical contact. The rear of the Penders vehicle was almost touching the, the Government vehicle on the, on the left side, front, right there. That was, the vehicle was in, on the curb, the Government vehicle was a short distance away from the curb. [35]

Q. Now, I asked you the last question, you put the rear of the Government vehicle north of the dividing line of the highway on the westbound traffic lane?

(Testimony of Charles E. Simpson.)

A. Yes, one of the photographs will demonstrate that. Which one——

Q. You will just testify, you will testify from Exhibit 17 that the rear of the vehicle was over this white line? I am just trying to clear up the discrepancy. Want me to show you those others—can I show you 17? Can I have 17, Mr. Clerk?

The Court: I think I have it here.

The Witness: The photograph with the other officers in the picture is the one I would like to see.

The Court: Is that seventeen?

Mr. O'Donnell: Yes, that's 17. You don't want 17. You want 18, I guess.

The Court: That's 18.

The Clerk: Yes, sir.

A. That's correct. You will note the distance between the rear of the Government vehicle and the white line in the photograph is just about the width of the man standing——

Q. I see. I just wanted to clear up that little discrepancy. You see I had in mind there the rear of the Government vehicle was over the white line but it's not sitting on the white line.

A. About eighteen inches.

The Court: Well, the vehicle wasn't moved when you took these various pictures? [56]

The Witness: That's right. That's right. We can place the rear of this vehicle by the scale of this map actually about there, about 18 inches from the centerline.

(Testimony of Charles E. Simpson.)

The Court: Not as good here. S-4.

Mr. Scholz: That is S-4.

The Court. Yes.

The Witness: The original sketch we started here and run it to scale would be—that is about the best I can do as far as that is concerned considering the scale of the map.

Mr. O'Donnell: All right, will you just take the stand again? Introduce this into evidence and marked——

The Clerk: Plaintiff's Exhibit 20.

Mr. O'Donnell: Twenty.

Mr. Scholz: No, that's Exhibit 17. Same thing.

Mr. O'Donnell: Let me see 17. No, that's another one. This is a close-up. They got the camera about——

Mr. Scholz: Is this 20?

Mr. O'Donnell: That's 20 there. The one with the camera—now I show you here. You want to look at that a moment?

The Court: What is this?

Mr. O'Donnell: 20, Exhibit 20.

The Court: I think——

Mr. O'Donnell: This is a close-up. I just want to ask him to identify the cars. [57]

Q. Which one is the Government car in that photograph?

A. It is the vehicle appearing at the left of the photograph as you face the photograph.

Q. And the other car is the Penders vehicle, is it?

A. Yes.

(Testimony of Charles E. Simpson.)

Q. And this jump seat, do you know now whether that is out of the Government car or not?

A. I would say that it was out of the Government car from my own knowledge because it was a matter of interest and I looked.

Q. I see. Fine. Now, I have here two photographs—(counsel conferring, not audible to reporter).

The Court: Would it be all right now if we take the noon recess?

Mr. O'Donnell: All right, Your Honor.

The Court: Because I am expecting a telephone call.

Mr. O'Donnell: All right. Fine.

(Noon recess, 12:00 to 1:30 p.m.)

Mr. O'Donnell: Sergeant, I presume Mr. Scholz has some questions.

Mr. Scholz: No, I think—no, I have no questions.

The Court: No cross-examination.

Mr. O'Donnell: I see. No cross-examination so—thank you, Sergeant.

(Witness excused.)

Mr. O'Donnell: Now, for the assistance of the Court, may it please the Court, I have had two photographs made, one [58] looking easterly towards the scene of the accident and one looking westerly, which I have shown to Mr. Scholz, and it has been stipulated that the same might go into evidence so

at this time for the purpose of the record, I want to introduce this photograph, which is looking easterly on Fremont Street towards the scene of the accident.

The Clerk: Plaintiff's Exhibit 21 in evidence.

Mr. Scholz: The only thing is, Your Honor, I reserve the right to show that there are any changes from the time the photograph was taken to the time of the accident. In other words, this was taken much later and I reserve the privilege to offer any evidence if it develops——

The Court: That is looking easterly?

Mr. O'Donnell: That is looking——

The Court: That is, the direction in which Penders car——

Mr. O'Donnell: That's right, Your Honor.

Mr. Scholz: That's right, Your Honor. Looking this way, Your Honor. That's the Del Monte Hotel up here, and——

Mr. O'Donnell: And I have another photograph looking westerly along Fremont Avenue or Street.

The Court: Well, is this 21, Exhibit 21, looking easterly just before you come to Park Avenue?

Mr. O'Donnell: That's it.

The Court: Park Avenue is on the left there?

Mr. O'Donnell: Park Avenue is on the left there.

The Clerk: The second photograph is marked Plaintiff's Exhibit 22 in evidence.

The Court: And this is looking westerly.

Mr. O'Donnell: Yes, Your Honor.

WILLIAM A. DAVENPORT

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. O'Donnell:

The Clerk: Will you state your name, please?

The Witness: William A. Davenport.

Q. And where do you reside?

A. Pacific Grove. 605 17th Street.

Q. And at this time you are connected with the California State Highway Patrol, is that correct?

A. That is correct.

Q. On May 11, 1946, what was your occupation?

A. I was a patrolman on the Monterey Police Department.

Q. Now, calling your attention to May 11, 1946, at or about the hour of 6:30 or 6:45 of the evening of that day, were you called to the vicinity of Park Avenue and Fremont Extension in Monterey?

A. I was.

Q. And upon arriving at that location what, if anything, did you observe?

A. We observed an accident had taken place there between an Army truck vehicle and a private automobile. [60]

Q. And what was the condition of the weather on that day?

A. May I look at the——

Q. Yes, you may refresh your memory from your notes. I understand that you are refreshing

(Testimony of William A. Davenport.)

your memory from notes made at the time that you arrived at the scene of the accident, is that correct, which are the——

A. These are the notes which were taken down and transcribed to this piece of paper or our actual report form immediately following the accident.

Q. And the records you have in your hand are the official records of the Monterery Police Department, are they? A. That is correct.

Q. I see. Fine.

A. The weather was clear that night according to my report here.

Q. The weather was clear and was it dark or light?

A. As I remember, it was still daylight when we arrived. It got dark before we finished our investigation of the accident.

Q. And at that time we had daylight savings or do you remember? A. I don't remember.

Q. You don't remember that. Now, upon arriving at the scene of the accident what, if anything, did you do?

A. The ambulance was there at the scene when we arrived and was taking care of the injured parties, removing them, the other officers, Lieutenant Marinello and Officer Betancourt and myself were the first to arrive representing the Police Department, I believe. We proceeded to assist in getting the injured out and taking measurements [61] and getting the accident scene cleared away from the highway.

(Testimony of William A. Davenport.)

Q. Now, how many injured people did you observe there at that particular time, if you remember?

A. There weren't as I remember all there at the time.

Q. I see.

A. Some had been removed previous to our arrival, that is, as my memory stands up.

Q. I see.

A. However, I have a list of the injured here that we took at the time of the accident.

Q. And will you read that list from your records?

A. Mr. Walter L. Penders, Mrs. Flora E. Penders, Mrs. Cathleen V. Hunt and Mr. David E. D-e-l-i-n.

Q. Edlin?

A. Edlin. Private Carl B. Wanless, Private Arthur Dobkins.

Q. I see.

A. And that was the list that I copied that night.

Q. And after you completed your task of assisting the ambulance crew, you stated you proceeded to take measurements? A. Yes, sir.

Q. And were you assisted by anyone in taking the measurements?

A. I assisted, or we all worked together. Officer Betancourt, Lieutenant Marinello and myself with the assistance of Officer Simpson taking the pictures.

Q. And, now, what measurements did you take on that day?

(Testimony of William A. Davenport.)

A. I have a, a diagram here drawn by Lieutenant Marinello in conjunction [62] with myself. We worked together on this. Which has all of the measurements that we were able to obtain that night.

Q. Now, using—may I see that—now, using this diagram that was made as appears on the notation there on it at the time, started at 8:15 p.m. and completed on 9:20 p.m. on May 11, 1946, did you observe any skidmarks on Fremont Avenue in the vicinity of Park Avenue? A. Yes, sir.

Q. And would you mind stepping down here before Defendant's Exhibit A and—are you familiar with the diagram on the blackboard here?

A. I think it's very similar to ours.

Q. I see. And would you show us where you found skidmarks?

A. Well, the skidmarks were intermediate, intermediate skidmarks from the Army vehicle. They weren't one continuous black mark. They were broken marks but not, apparently applied his brakes several occasions to stop from, prevent his hitting the other automobile. They weren't one black track but they continued that way for 102 feet from the point of impact to the vehicle.

Q. From the point of impact?

A. To the point of impact, I should say.

Q. Are you familiar—the scale of this map is 20 feet to 1 inch, and if I might have that ruler again, Mr. Clerk—can you mark out there, bearing in mind that the scale on this particular map, which

(Testimony of William A. Davenport.)

is Defendant's Exhibit A, where you saw these, observed these intermittent skidmarks that you have told us about?

A. I just wonder—they would run to—this would be the Government [63] vehicle, S——

Q. Let me put it to you this way before I ask that question to make it easier for you: Can you mark on that map, just as Sergeant Simpson has done, and if you agree with him, you can use the same diagram, the same location, where the measurements were when you arrived at the scene of the accident?

A. Well, the vehicles, the front, you can see from where the Government vehicle, but our measurements was 53 feet and 10 inches from this point of the center of Park Avenue at a point which I believe it would be probably a little farther.

Q. All right, let's take the ruler here now. That's fifty——

A. 53 feet and 10 inches.

Q. From the——

A. From the center-most point of Park Avenue.

Q. O.k. We'll mark that 1-D. How many feet was that again now?

A. 53 feet and 10 inches.

Mr. Scholz: I suggest that it would be better if you marked it yourself.

Mr. O'Donnell: I was just trying to, taking——

Mr. Scholz: ——because I don't think they might agree *agree* with the photograph.

(Testimony of William A. Davenport.)

The Witness: One inch is equal to 20 feet?

Mr. O'Donnell: One inch is equal to 20 feet, so it would be 2 inches.

(Witness at blackboard, few words inaudible.)

Mr. O'Donnell: Well, someone said less than a quarter. [64]. Make it three-sixteenths.

Q. All right, now. That spot you marked on the board and that pencil mark, what does that indicate?

A. That would indicate——

Q. The position of what?

A. The right front end of the, Mr. Penders' car. No, excuse me, the military police vehicle.

Q. All right, the right front. In what direction was that facing at the time? May I have those photographs—maybe we can, for the purpose of——

A. Facing generally north, northeast on our diagram here.

Q. Northeast. All right. Will you draw a little parallelogram in a northeast direction there indicating—all right, we will mark that 2-D, which indicates the position of the Government car, is that correct?

A. As near as I can determine, yes.

Q. And that was—for the purpose of refreshing my memory—how far from point 1-D here?

A. 53 feet and 10 inches.

Q. 53 feet and 10 inches. Now, from your notes, can you tell us the position of the Penders automobile? If you can, just tell us.

(Testimony of William A. Davenport.)

A. Oh. Would you repeat that again?

Q. Can you tell us the position of the Penders automobile?

A. The Penders automobile, the rear of the Penders car was just, left side, or towards the front, the left front of the military police vehicle facing generally a northwesterly direction.

Q. All right. Now, will you draw a parallelogram on the map [65] indicating the position as your notes disclose—the position of the Penders car?

A. Doesn't seem to be exactly the diagram here. We don't have this shoulder or unimproved section that you have on your map.

Q. On your map?

A. It's not shown on my map so there may be some little confusion there as to, in my mind, relative to the position of the cars to that section there.

Q. I see.

A. I think Lieutenant Marinello may be able to straighten that out a lot more clearly.

Q. I see. Well, we will mark this as the position of the Penders car as D-3. Now, let's get back to the skidmarks again. You have placed the position of the Government car. Now, how far east of the Government car, the position of the Government car, when you arrived at the accident, did these intermittent skidmarks extend?

A. For a distance of 102 feet.

Q. So, taking the ruler again—all right. Now

(Testimony of William A. Davenport.)

you have drawn a line on the map from the position of 2-D which is the position of the Government's car after the happening of the accident to a point which I have marked D-4, which indicates the distance over which the skidmarks extend intermittently, using your expression.

Mr. O'Donnell (as Court steps down): You want me to make that dark, Judge?

The Court: I can't see from up there.

Mr. O'Donnell: I'm sorry. Is that o.k.? [66]

The Court: Yes.

Mr. O'Donnell: All right. Now, if you will just take the stand again, will you?

(The Court and the witness return to seats.)

Q. Now, you made other measurements at that time, other than skidmarks? A. Yes, sir.

Q. And what other measurements did you make, Mr. Davenport?

A. We have measurements of the width of that half of Fremont Extension; in other words, from the double white line to the curbline of the Extension, of Fremont Extension.

Q. I will have to ask you to step down here again and if you will just indicate again where your measurement—

A. We measured from the continuation of the curb-line on Fremont up on to Park, from there to the double white line here.

Q. I see.

A. In other words, we weren't, we didn't include

(Testimony of William A. Davenport.)

the other half. All the activity took place on the——

Q. North side of the highway?

A. North side of the highway.

Q. I see. And continuing the curb-line of Fremont Avenue west, east of Park Avenue up to the middle of Park Avenue, what was the measurement from there to the center of the highway?

A. Thirty feet.

Q. Thirty feet? A. Yes.

Q. All right. Now, what other measurements did you take, if you remember?

A. The width of Park Avenue, which as I remember correctly, if I remember correctly, was, just a moment, [67] the width of Park Avenue at the widest point at that intersection which we determined to be fifty feet.

Q. Well, are you—at its widest point, in other words?

A. Would be a point as I remember it right, I'm not, not, I can't be accurate on that.

Q. But as Park Avenue enters into Fremont Extension, it widens, does it?

A. That's right; yes, sir.

Q. In other words, it has a broad curve towards the west, isn't that correct? A. Yes.

Q. And there is a dog-leg, so to speak, just east of Park Avenue? A. On Fremont, yes.

Q. On Fremont. What is the contour of the road, that is, going east on Park Avenue towards, on Fremont Street towards Monterey?

(Testimony of William A. Davenport.)

A. That is upgrade.

Q. That is upgrade?

A. To the, up to the eastern edge of Park where it more or less levels off again.

Q. And is the road straight there or does it make any slight turn of any kind?

A. Fremont Street makes a dog-leg, as you named it, to the left as you are traveling east, that bend makes its sharpest point right about where Broadway enters Fremont.

Q. Park enters Fremont?

A. Excuse—Park enters Fremont.

Q. And is Fremont Extension east of Park Avenue level?

A. Well, comparatively level.

Q. May I see your notes just for this moment? Now, with relation [69]—if you don't remember this, you don't have to answer it—with relation to the curb-line on the north side of Fremont Avenue west of Park Avenue, can you tell us whether or not the Penders car was up over that curb-line or not?

A. I believe that the Penders car was not over the curb-line but up to the curb-line, if I—

Q. I see. Did you take the width of Park Avenue, save and except the position that you have point—

A. Only the distance between the center of Park Avenue to the eastern edge of Park Avenue.

Q. What was that distance?

(Testimony of William A. Davenport.)

A. 19 feet and 6 inches.

Q. And the widest part of Park Avenue where it enters Fremont Street, I think you testified, is 50 feet? A. That's correct.

Mr. O'Donnell: Just pardon me a moment. I think that's all.

The Court: Just read that last statement.

(Last question and answer read.)

Cross-Examination

By Mr. Scholz:

Q. Sergeant, you stated you took a list of the injured persons; you didn't know what the nature and extent of their injuries were, did you?

A. Only very little. We wrote up at the hospital but, of course, the doctors hadn't at all completed their diagnosis and we were only able to get very sparse information. [69]

Q. Did you make the report or did Lieutenant Marinello make a report on this written report?

A. Yes, sir; I wrote the report.

Q. You wrote up the report? A. Yes, sir.

Q. Have you got that with you?

A. Yes, sir.

Q. May I see it? Thank you. Sergeant, while Mr. O'Donnell is reading your report, do you want to take a look at Exhibit No. 16, the photograph—can be looking at that. Now, these reports that you handed me, Sergeant, they were made up shortly after the accident?

(Testimony of William A. Davenport.)

A. We came directly from the accident into the office and wrote all our reports.

Q. And then they were typed there?

A. Well, you will have to excuse the typing on that. I'm afraid I did that myself and I'm not a very——

Q. Well, I think it's very good. That's better than I could do. But I mean you typed these yourself?

A. Yes, sir.

Q. And they are true and accurate——

A. Yes, sir.

Q. ——together with the copy of the accident report on the form provided by the State of California?

A. Yes, sir.

Mr. Scholz: I offer these in evidence then, if Your Honor please. Do you want me to read them in?

The Court: You can read them.

Mr. Scholz: All right. I offer them as one exhibit.

The Witness: Those are borrowed from the files of the Monterey Police Department and they would like to have—— [70]

Mr. O'Donnell: I presume you can make copies of them.

Mr. Scholz: Yes, I think I will have some copies made. Can that be stipulated?

Mr. O'Donnell: That will be stipulated.

Mr. Scholz: I will have some copies made and then we will see that they are returned.

(Testimony of William A. Davenport.)

The Court: What exhibit is that?

Mr. Scholz: Defendant's Exhibit B, Your Honor.

The Court: C?

Mr. Scholz: B. May it be considered read in evidence then, Your Honor?

The Court: Yes. Do you mind—I would like to see them.

Mr. Scholz: Yes, I think it might be well.

Mr. O'Donnell: Both the reports and the cards have gone in as one exhibit, have they?

Mr. Scholz: That's right.

The Court (Pause): All right.

Q. Now, Sergeant, referring to Exhibit 16, which is the photograph, you note on that—you have seen that picture before?

A. I saw the smaller copies.

Q. You will note on that, there are some skidmarks designated and that the Sergeant indicated that they were almost parallel to that white line, which is the line separating the two lanes on the north side of Fremont, is that correct?

A. Yes, sir.

Q. And those are the skidmarks that you saw?

A. That's [71] right; yes, sir.

Q. Now, you note on there also some skidmarks apparently that turn into Park Avenue there?

A. Yes, sir. I noticed some marks on the road; yes, sir.

Q. That was skidmarks which were made, not caused by this accident?

(Testimony of William A. Davenport.)

A. No, that didn't have anything to do with the accident.

Q. And were they made that day?

A. I don't know, sir.

Q. Don't know. Well, now, the skidmarks that you saw, that you indicated on the diagram, do you know of your own knowledge whether they were made by this Army vehicle?

A. Well, sir, they, they, according to the testimony or statements of the driver of the Army vehicle at that time, which I don't know I am allowed to quote now or not, in his statements to us that he had applied his brakes in that way that we then followed those marks from their starting point to his vehicle and they lined up directly with the tires on his vehicle so they were determined then that they were his skidmarks as part of the accident.

Q. Now, you say that the driver of the Army vehicle was Wanless, did you not?

A. Yes, sir.

Q. You also stated that he was injured?

A. I might retract part of what I said there, if I may. I don't remember what the, whether it was he that said that or the other person that was with him. I remember one of them was injured and I don't remember which one it was that we were able to talk to at that time. [72] However, the skidmarks from their starting point, from our observation, I hesitate to state what was said that, at that time be-

(Testimony of William A. Davenport.)

cause it has been quite a period of time back and I, reluctant to say something that I can't back up but the skidmarks themselves were obviously fresh on the road by their texture and all and did continue from their starting point over the hill down in line with the other vehicle and ended at the wheelmark or wheels of the Government vehicle. As such, I feel that they, we, were determined that they were the skidmarks of that vehicle, the——

Q. In other words, you determined they were the skidmarks of this vehicle because they apparently were fresh skidmarks that had been made recently, is that right?

A. That's right. The other skidmarks that we saw there in the road as being thrown out were determined as not being part of it because of their texture. It was more or less obvious to myself that they had been there some time, whether that day or not, it's hard to determine, but they were not minutes old. They were apparently quite old.

Q. Now, the skidmarks indicated that the Government vehicle was proceeding west on Fremont Street, is that correct? . A. That is correct.

Q. And that he was on the, they are in a lane, that is, the lane next to the double line, he was to the, closest to the double line, is that correct, until he started to turn off into [73] the, the north lane, outside lane, is that correct?

Mr. O'Donnell: You understand that question, Mr. Davenport?

(Testimony of William A. Davenport.)

The Witness: I believe I do.

The Court: Let the reporter read it to you again.

(Question read.)

Mr. O'Donnell: Oh, I suggest that question be reframed, may it please the Court.

Mr. Scholz: I have no objection.

The Court: Oh, yes.

Q. In other words, the skidmarks indicated the Government vehicle was traveling, before it started to make a turn, in the inner lane, that is, the lane closest to the double line, is that correct?

A. No, sir. As I remember, I don't think so. I believe that the Government vehicle was traveling in the outside lane next to the curb when it came around the——

Q. Now, you have drawn a line indicating a skidmark. Is that supposed to represent the left wheel or wheels of the Government vehicle or the right wheel or wheels?

A. Do you have the sketch there, sir?

Q. Yes, I am not trying to confuse you, Officer; I am just trying to get the facts.

A. Oh, I understand. I am trying—if you will bear with me—I probably sound confused.

Q. No, not at all.

A. I am trying to recall some of those things as you go along. As I remember the skidmarks, it showed [74] them from——

(Testimony of William A. Davenport.)

Q. Would a reference to Exhibit 16 help you?

A. I believe that there was only one distinct skidmark, not from both wheels and I'm not sure, I wouldn't want to say at this time whether it was the left or the right. However, I don't remember.

Q. In other words, as I understand you, you don't remember whether that skidmark was made by the left wheels or the right wheels?

A. No, sir.

Q. Did the direction of the skidmarks indicate that the Government vehicle was turning to the right or north?

A. At what time, sir? You mean, were they going to make a left turn before the accident?

Q. No. No, the question I asked, Sergeant, is this: Did the skidmark that you testified to show that the car was going to the north, that is, to the right, or to the north, in that general direction?

A. The skidmarks were generally in a straight line at an angle from the, the white line dividing the lanes to the, slightly to the north. I think, as I have drawn it there on the scale, on the——

Q. Now, you indicated that the skidmark was approximately, the end of the skidmark was approximately 22 feet north of the double white line, is that correct?

A. Well, you can determine that a little closer, the military, the front, the left front wheel of the military police vehicle at the final resting place is 8 feet and 8 inches from the curb, the skidmark ended [75] at the rear wheel of the vehicle.

(Testimony of William A. Davenport.)

Q. Which wheel? Which rear wheel, do you know?

A. Would be the right rear wheel, right rear of the vehicle.

Q. The skidmark ended at the right rear wheel. Then the skidmarks made were by the rear wheels of the——

A. I don't want to say that; no, sir.

Q. All right. I don't want you to say anything you don't want to.

A. The skidmarks are there, however. It doesn't necessarily—I don't know which one it was that made that. I can't answer that truthfully.

Q. I know it's quite difficult, Sergeant. I sympathize with you. By looking at Exhibit 16, would you not state that those skidmarks start from the white line, north of the double line and run approximately as far as that photograph is concerned, about 3 feet to the north?

A. I wonder if I could ask you to repeat that again.

Q. Yes, please.

(Question read.)

A. When you say "start from the white line north of the double line——"

Q. The white line which is the dividing line on the north, for the westbound traffic, that is what I mean. They start from that white line, do they not?

A. Very close to it; yes, sir.

(Testimony of William A. Davenport.)

Q. And the photograph indicates, does it not, that they branch off on a northwest by west direction? A. Yes, sir.

Q. And as far as the photograph is concerned, does it indicate [76] that they end about north 3 or 4 feet of the white line which divides the westbound traffic?

A. On the photograph, on the end of the photograph here you mean?

Q. Yes.

A. Well, I, I, it's hard to determine exactly the distance there from this photograph here.

Q. Well, what would be your—were you there when the photographs were taken, Sergeant?

A. I was working on other parts of the accident and I was not observing Officer Simpson at the time taking the pictures. In fact, I never saw the pictures until this, very recently.

Q. Sergeant, you mentioned that Park Avenue is 50 feet at the widest. Now, that's an odd-shaped intersection? A. Yes, sir.

Q. You note. And did you mean when you said 50 feet at the widest, did you mean from the east curb of Park Street to the point indicated here by the edge of the pavement and the curb?

A. You can observe here from our diagram more accurately at a point which would probably be the continuation of the inside of the sidewalk and continuing it out.

Q. Oh, I see.

(Testimony of William A. Davenport.)

A. No, sir; the other way. Up and down. North and south.

Q. Oh, you mean this way? A. Yes.

Q. Oh, I see what you mean. That's the way?

A. Up here right across. You see, from our—which is very similar but ours isn't to scale, the exact——

Q. Oh, I see. You took a prolongation of the——

A. Right here. [77]

Mr. O'Donnell: West of the curb-line.

Mr. Scholz: West of the curb-line.

The Witness: At an angle right here.

Mr. Scholz: Oh, I see. But the width from the east curb-line to the edge of the pavement there, well, that speaks for itself. Is approximately a hundred feet.

Q. You arrived there, Sergeant, about 6:41 p.m.?

A. Approximtaely. It's on the report there, I believe.

Q. Well, anyway, that's the date you arrived. I don't care—and did you have any discussion with anybody at the time of the accident?

Mr. O'Donnell: I am going to object to any dicussion, may it please the Court, unless the plaintiff was there. The discussion wouldn't be binding upon the plaintiffs in this action.

Mr. Scholz: Well, at the time the plaintiffs were there then.

The Court: Well, I think you ought to lay a foundation.

(Testimony of William A. Davenport.)

Mr. Scholz: It's a preliminary question. I don't know whether he had discussion or not. I just asked if he had any discussion.

A. We weren't able to talk very extensively to anyone there. As I remember, I believe that the one soldier had not been taken away yet and we were able to ask him—I don't remember any discussion pertaining to the accident at the time this accident, [78] about injuries, I think, one of the soldiers, I think, they were just getting ready to take——

Q. Your testimony then is to the best of your recollection, you don't remember discussing it with anybody at the time of the accident?

A. Not at the scene of the accident.

Q. That's what I meant; the scene of the accident.

Mr. Scholz: I think that's all.

Redirect Examination

By Mr. O'Donnell:

Q. Mr. Davenport, you have investigated many accidents during your police career, have you not?

A. Quite a few; yes, sir.

Q. And as a part of your work, you measure skidmarks? A. That is correct.

Q. And make a complete investigation as to all the surrounding circumstances?

A. As much as——

Q. Of every accident, do you not?

(Testimony of William A. Davenport.)

Mr. Scholz: I object to what he says they do, any other accidents.

Mr. O'Donnell: I want to clear it up now.

Q. Is there any doubt in your mind that the skidmarks about which you have testified here today which you say extend for 102 odd feet, are not the skidmarks from the Government vehicle?

A. I definitely stated they were the skidmarks.

Q. They were the skidmarks.

Mr. O'Donnell: I think that's all. [79]

Mr. Scholz: That's all, Sergeant. Thank you.

(Witness excused.)

Mr. O'Donnell: Now, you made a statement, I think you ought to have it in the record, from what point to what point Park Avenue at this intersection is 100 feet?

Mr. Scholz: I think I made a careful note, may be wrong. From the, from the east curblin of Park where the, the——

Mr. O'Donnell: That's the property line you are on now.

Mr. Scholz: Yes, the property line to the edge of the pavement is 4 and 4½, let's see.

Mr. O'Donnell: Let us stipulate.

Mr. Scholz: That would be about——

Mr. O'Donnell: Let us stipulate from A to B.

Mr. Scholz: It's here. You can figure it out.

Mr. O'Donnell: Is 90 feet o.k.?

Mr. Scholz: Don't mark it up.

Mr. O'Donnell: That's all right. I mean that's not important.

Mr. Scholz: I just want to know where he is measuring from.

Mr. O'Donnell: Mr. Hartshorn. [80]

EDWIN H. HARTSHORN

called as a witness by the Plaintiffs, having been first duly sworn by the Clerk, was examined and testified as follows:

The Clerk: Be seated, please. Would you state your name, sir?

The Witness: Edwin Herbert Hartshorn.

The Clerk: Would you spell your last name, please?

The Witness: H-a-r-t-s-h-o-r-n.

Direct Examination

By Mr. O'Donnell:

Q. Mr. Hartshorn, where do you live?

A. I live at 150 10th Street, Pacific Grove.

Q. And what is your business or occupation?

A. I am a bus-driver, sir, at the Bay Rapid Transit Company in Monterey.

Q. And the Bay Rapid Transit Company is a passenger——

A. It is a city line, transit company.

Q. Oh, city transit company? A. Yes, sir.

Q. And that's the city of Monterey, Pacific Grove?

A. That takes in Monterey, Pacific Grove and Carmel——

(Testimony of Edwin H. Hartshorn.)

Q. And how long have you been in their employ?

A. I have been there now three years as of the, March 28th this year.

Q. And you were employed as a bus-driver by that concern on May 11, 1946, is that correct?

A. No, sir, I was employed there March 28, 1946.

Q. I see, but you were so employed on May 11?

A. Yes, sir; I was there; yes, sir. [81]

Q. 1946. And on May 11, 1946, what was your run?

A. It was the Fremont Extension run, sir. It's Route 7.

Q. And by the Fremont Extension run, do you run over and across Fremont Extension?

A. Yes, sir.

Q. And do you pass the portion of Fremont Extension where Park Avenue enters Fremont Extension?

A. I do, sir.

Q. And you are familiar with the contour of the ground there at that particular location?

A. I am, sir.

Q. Have you worked continuously on the run Number 7, that is, the Fremont Extension run?

A. At that time I had; yes, sir.

Q. You are not on that run any longer?

A. I am not any longer, no.

Q. Now, you say you operate a bus. Do you drive the bus?

A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. And I presume it is similar to a San Francisco bus. You collect fares?

A. Yes, sir, we handle the cash, everything. It is one-man operated.

Q. One-man operated? A. Yes, sir.

Q. And how big are these busses?

A. They are 27 passengers.

Q. Twenty-seven passengers. Can you tell us approximately how high you sit above the ground when you operate one of those busses?

A. That particular bus, the bus No. 65, it clears, my vision is clear out of the window, that is, out looking through the window is just about 8 feet. I measured it. [82]

Q. So you are elevated 8 feet, is that correct?

A. That's right.

Q. From this point of vision?

A. In that particular bus; yes, sir.

Q. And you remember on May 11 you were operating this particular bus, is that correct?

A. Yes, sir; I was.

Q. Now, on May 11 at or about 6:40 p.m. of that day did you witness an accident at the point on Fremont Avenue where Park Avenue enters into—or Fremont Extension, rather? A. Yes, I did.

Q. You did. Do you know Mr. Penders, the plaintiff in this action? A. Yes, sir.

Q. Walter Penders. And you became acquainted with him since the happening of this accident?

A. That's right, sir.

(Testimony of Edwin H. Hartshorn.)

Q. And, now, you subsequently learned he was operating an automobile on that day?

A. Yes, sir.

Q. Where was Mr. Penders operating his automobile on Fremont Extension when you first observed his car?

A. He, he was in my lane. I was on the outside lane going eastward on Fremont Extension and he was in front of me at that time.

Q. At that time? A. Yes, sir.

Q. And approximately how far west of Park Avenue was it when you first observed Mr. Penders' car in the outside lane traveling east?

A. Well, I would say it was about 300, three to four hundred feet west of the intersection, pardon me, the intersection across the street from Park Avenue. [83]

Q. I see.

A. There is a, there is a side street in there. I forget the name of it now.

Q. That's the side street. What is the name of that—

A. Yes, sir, it's practically down, there's Monterey College there, there's an intersection that goes into Monterey College there, I mean it was there, it was there at that time.

The Court: Approximately 400 feet west of the intersection on that map?

The Witness: Yes, sir. There's an intersection down there now about where your finger is now.

(Testimony of Edwin H. Hartshorn.)

Q. That is just about where you first observed it in the outside lane traveling east?

A. Yes, sir.

Mr. Scholz: That's Augussita.

Mr. O'Donnell: No, he's talking about something different. He is talking about something different.

Mr. Scholz: All right.

Q. Now, will you tell us what you observed in the operation of Mr. Penders car after you first saw it at the place that you have already indicated?

A. Well, I was going the same direction and he cut over into the second lane, the inside lane.

Q. That would be next to the double line?

A. Yes.

Q. Dividing the highway?

A. That's right, and he went on up the street, this, I should say about to the end of that intersection on the upper side of the intersection. There's a golf course there on the righthand side. [84]

Q. That's the Del Monte Golf Course?

A. I don't know the name of the street, I can't remember it now, and then he cut over across the white line and I noticed an Army vehicle coming down the street.

Q. Now, just before we get to that; now, as you—can you step down here, if you will?

A. Yes. (Steps down.)

Q. I don't think you have seen this map before?

A. Yes, sir. I was studying it this morning.

(Testimony of Edwin H. Hartshorn.)

Q. Oh, I see. Now, you are familiar with the map. This is west, Monterey is here and Del Monte, this is Fremont Extension, this is Park Avenue. What is the name of this street again?

Mr. Scholz: Augussita Road.

Q. Augussita Road, you are familiar with Augussita Road also? A. Yes, sir.

Q. Now, bearing in mind that the scale of this map is one inch to twenty feet—every inch upon this map represents twenty feet, twenty feet distance—can you point out to us where it was, if you can, on this particular map that Mr. Penders car was driven out into the inside lane going east?

A. Well, I would say on the average just looking at the map here, right, he cut over, let's see, this is the outside lane, right over here is, he cut into this lane here.

Q. Cut into this lane. And by "this lane," you mean the inside lane?

A. Inside lane going east.

Q. Going east, traveling east? A. Yes, sir.

Q. And where did you mark that?

A. Right about—

Q. We will just put a—and that will be H-1 which indicates the position of Mr., no, which indicates the place where Mr. Penders drove his car from the outside lane to the inside lane on the eastbound traffic side of the highway?

A. That's right.

Q. Is that correct? A. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. All right. Now, as Mr. Penders drove his automobile from the outside lane to the inside lane, did you observe him put his hand out or make any other signals? A. Yes, sir, I did.

Q. And about the same time can you tell us about when he put his hand out?

A. He put his hand out right after he cut out into the other lane, to pass over the double line.

Q. And he continued to keep his hand out how long, as you remember?

A. He continued right up until he made the turn.

Q. Until he made the turn? A. Yes, sir.

Q. All right. Now, we have him at point H-1 cutting into the inside lane of the eastbound traffic side of the highway. Now will you trace his course for us with that pencil and show where he made the turn into Park Avenue?

A. Well, he continued right on up the street, I would say.

Q. You are marking that on the inside——

A. I am marking that on the inside lane going east; yes, sir.

Q. Going east?

A. And I should say he continued right on up to about here and then he cut over. He made a left turn right here. [86]

The Court: H-2, is it?

Q. I see. H-2. H-2, right about here?

A. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. H-2 indicates the position of Mr. Penders car on the highway when he proceeded to make his turn to the left? A. That's right.

Q. And up to that time Mr. Penders at all times had his hand extended, is that correct?

A. That's right.

Q. Indicating his intention to turn. Now, at that time did you notice any automobiles approaching from the east on Fremont Street, Fremont Extension?

A. Coming in the opposite direction?

Q. Yes.

A. There was only one, sir. That was the Army vehicle.

Q. That was the Army vehicle?

A. Yes, sir.

Q. Now, can you indicate upon this map where it was that you first observed the approach of this Army vehicle from the east?

A. I should say—

The Court: You mean where was he or was the Army vehicle?

Mr. O'Donnell: Strike that out, Miss Reporter, and we'll start all over again. He saw this Army vehicle approaching.

Q. Where were you when you first observed the approach of this Army vehicle?

A. At that time I was just, well, just below this intersection right in here, between this newer intersection [87] that's in here now and this one.

Q. Will you mark on the map approximately to

(Testimony of Edwin H. Hartshorn.)

the best of your recollection where you were when you first observed the approaching Army vehicle?

A. I should say I was about 200 feet below this intersection.

Q. Two hundred feet below this intersection?

A. That's right. As close as—

Q. Well, I guess we wouldn't be able to get that on then because that would be a hundred feet, that would be way down here? A. Way down here.

Q. Well, we'll mark it down there. That will be H-3, indicating your position when you first observed the approaching Army vehicle. Where was it that you first observed the Army vehicle?

A. I, he was about, oh, a good 175 to 200 feet the other side of this pole on the corner here, on this inside lane.

Q. On the inside lane?

A. No, see, the outside lane coming westward would be the outside lane he was following on the outside lane.

Q. Outside lane? A. That's right.

Q. All right. Now, how many feet did you say?

A. I would say around 175, 200 feet.

Q. Of this pole here? A. That's right.

Q. Right about, his position where I have marked it there?

A. That's right. There's a Shell station right in here, service station. [88]

Q. There's a Shell station. You observed—

A. Service station. He was practically just opposite that Shell station.

(Testimony of Edwin H. Hartshorn.)

Q. That Shell station. So that will be marked H-4 indicating the position of the Army vehicle when you first observed it. A. That's right.

Q. Now, at that time did you have occasion to observe the rate of speed that Army vehicle was traveling?

A. No, sir, I couldn't tell you, coming facing me like that, I couldn't tell you just how fast he was going.

Q. Now, you continued all this time to be traveling easterly, is that correct? A. That's right.

Q. What was the next thing that attracted your attention to the Army vehicle?

A. Well, I noticed at the rate of speed he was going and——

Mr. Scholz: Well, just a minute. You testified just a minute ago that you couldn't tell the speed the Army vehicle was going.

The Witness: Well, I couldn't. I couldn't tell you just how fast he was going but I know he was going at, well, he was going right along, that way.

Q. You would say it was a rapid rate of speed?

A. Yes.

Q. But you wouldn't want to indicate the miles per hour? A. No, I couldn't do it.

Q. All right. Now, could you tell us what you observed after you saw the cars in their respective positions?

A. I saw [89] the way, the position that Mr. Penders was in, the way that he was going that

(Testimony of Edwin H. Hartshorn.)

either the Army vehicle was going to have to cut out around and miss him on the westward side of the inside lane or there was going to be an accident right there. I saw that much in a hurry.

Q. Did you observe the Army vehicle at the spot which we have marked H-4 before Mr. Penders started to make the turn at the point that you have indicated by H-2, if you remember?

A. Have to study this a minute. I saw, yes, he was, after he made the turn, I couldn't see, you couldn't see the vehicle, the Army vehicle until after he was over in here. That's when I noticed. He was across the white line when I could see the Army vehicle.

Q. As that Army vehicle approached Mr. Penders car, can you tell us the manner in which it was being operated?

A. Mr. Penders' car?

Q. No, the Army car.

A. The Army vehicle.

Q. As it approached Mr. Penders' car?

A. Well, as it came up, the closer it got, I could see that he had noticed the vehicle in the street, the other vehicle. You could tell that he was applying the brakes because the Army vehicle was, you could tell that he was putting on brakes, not, because the Army vehicle——

Q. What indicated to you the driver of the Army vehicle was applying the brakes?

A. Well, I noticed that the car was, you [90] know how when you put on the brake all the way like that, it will try to go sideways.

(Testimony of Edwin H. Hartshorn.)

Q. It kind of swayed?

A. Swayed, that's it.

Q. Now, you witnessed the collision, did you?

A. Yes, sir.

Q. And will you tell us what parts of these two cars collided?

A. The front end of the Army vehicle hit the civilian car at, right just behind the column right behind the front bumper. That is where the point of impact was. That's where it first hit was there.

Q. Can you point out on this map the position of Mr. Penders' car at the time it was struck by the Army car?

A. Mr. Penders' car?

Q. Yes, Mr. Penders' car, bearing in mind—

A. He came on around like this coming out of this street right here, I should say it was about, this is, this is where the car stopped.

Q. That's about Mr. Davenport's—

A. Well, I should say that it, that it was about 15 feet, 15 or 20, from the point of impact.

The Court: What was about 15 to—

The Witness: The, the civilian car. It went back down the hill, it went right sideways, when that Army truck hit it, it knocked it sideways.

Q. Knocked it sideways, did it?

A. Yes, sir.

Q. And approximately 15 feet, did you say?

A. Yes, sir.

Q. And when Mr. Penders' car came to rest, what was its position? [91]

A. It was up against the curb, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Up against the curb of the——

A. On the curb facing on the Fremont Extension where you come out on Park Street is about, you got the curb right here.

Q. Yes.

A. Well, his front wheel was up against here.

Q. Will you mark that now? All right. That's Penders' car about like this? A. That's right.

Q. That will be D-5.

The Court: H-5.

Mr. O'Donnell: Or H-5, rather. I beg your pardon.

Q. Now, you say that Mr. Penders' car was thrown about 15 feet? A. Yes, sir.

Q. Will you mark on there, if you will, approximately to the best of your recollection the point of impact, that is, where the two cars collided?

A. Let's see, this is—it's hard to tell.

Q. You understand my question?

A. Yes, sir. I'm just studying this map.

Q. Well, let me ask you this before you answer that question: Maybe I can help you out a wee bit. How far had Mr. Penders completed his turn, or how far had he proceeded over the north portion of Fremont Street when he was struck by the Government automobile?

A. He was in the outside lane, practically out of it, in fact.

Q. He was practically out of the outside lane?

(Testimony of Edwin H. Hartshorn.)

A. That's [92] right.

Q. And by the "outside lane," you mean the outside lane on the north?

A. On, on, let's see, would be the westward.

Q. Of the westbound traffic?

A. That's right.

Q. And you say he was practically out of it?

A. Yes, sir.

Q. He was? A. He was.

Q. And the Army vehicle struck him on the right side, just about the cowl, is that correct?

A. Yes, sir.

Q. All right, now. Will you mark the position, if you will, of Mr. Penders' car at the time of the impact?

A. Came up around here, I would say, right in about here.

Q. Relieve you——

A. Figure that out on the map.

Q. Yes, and that will be H-6. Thank you.

The Court: Six.

Q. Which indicates the position of Mr. Penders' car at the time of the impact.

The Court: I think we will take a recess for five minutes.

Mr. O'Donnell: All right, Your Honor.

(Recess, 2:42 to 2:48 p.m.)

Mr. O'Donnell: All right, you can take the stand again.

Q. Now, from your point of observation, could

(Testimony of Edwin H. Hartshorn.)

you tell approximately how fast Mr. Penders' car was traveling up—— A. Well——

Q. ——to the time of the impact? [93]

Mr. Scholz: Object to that on the ground that he has already been asked and answered, and he said he didn't.

The Court: No, he referred to the Army vehicle.

Mr. Scholz: Oh. I withdraw the objection.

The Court: That question has never been asked before.

A. I would say Mr. Penders' car was traveling at approximately 10 to 15 miles an hour.

Q. Now, after the impact what, if anything, did you do?

A. After the impact, I stopped the bus as soon as I seen what was happening, I slowed down, stopped the bus. I had such a load that the rest of my passengers couldn't see so I stopped the bus and told everybody to remain in the bus until I got back. I took the fire extinguisher with me and went over to the cars and it was smoking. Where they hit, where the cars hit, it broke the gasoline line off and it was smoking and I thought it was going to catch afire so I extinguished it and I noticed that the one lady in the back seat, her head was laying on the running board and due to a cut in the side of her face, the blood was running in her mouth and her head was down and she was choking so I moved her head to the back seat and she stopped right off.

Q. Do you recall which woman that was?

(Testimony of Edwin H. Hartshorn.)

A. She had on a flowered dress. I don't just recall. She was the younger of the two.

Q. Were you there when the police arrived?

A. No, I wasn't. I called the Police Department and—— [94]

Q. And you went on your way, did you?

A. I called the Police Department and they told me to go along and they were waiting for me when I got back to the depot.

Q. Now, I show you here Plaintiff's Exhibit No. 20 and ask you whether that is a fair representation of the position and condition of the cars involved in this accident when you first observed them, immediately after the impact? A. Yes, sir, it is.

Q. And can you identify this object that appears at the righthand corner, lower corner, of the photograph?

A. Yes, sir, that is the seat out of the Army vehicle.

Q. Seat out of the Army vehicle?

A. Yes, sir.

Q. And calling your attention to Plaintiff's Exhibit No. 19 and calling your attention particularly to what apparently appears to be an automobile seat in the lower lefthand corner, I'll ask you if you can identify that?

A. Yes, sir, that is the other half of the seat of the Army vehicle, I would say.

Q. The other half of the Army vehicle's seat?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. You have continued to live down there in that vicinity, is that correct?

A. Yes, sir, I have lived there all the time.

Q. And has the contour—got any more—have I got all those—

The Clerk: All the pictures, I believe. Oh, I'm sorry. Here are two more.

Q. Since May 11, has the condition—

The Court: 1946. [95]

Q. —of the roadway, that is, Fremont Extension in the vicinity of Park Avenue, is it in the same condition today as it was at the time of the happening of this accident on May 11, 1946?

A. Exactly the same, sir.

Q. Exactly the same? A. Yes, sir.

Q. The road hasn't been—

A. Hasn't been—

Q. —improved by widening or anything else?

A. No, sir.

Q. I show you here Plaintiff's Exhibit 22 and 21 and ask you whether that is a correct representation of the road, Fremont Extension in that vicinity at the time of the accident?

A. Yes, sir. This is the, looking eastward.

Q. Yes, sir, and are you looking at 21?

A. This is looking westward.

Q. I see. Fine. I will show you a photograph and ask you whether or not you can identify that?

A. Yes, sir. I took it myself.

Q. And when was that photograph taken?

A. That photograph was taken, I can—may I

(Testimony of Edwin H. Hartshorn.)

look at my paper here, sir? I have negatives in my pocket.

Q. Let the Judge see the photograph while you are——

A. It doesn't have it on here, but it was——

Q. Approximately?

A. I'll tell you exactly what day it was. I got them, I got them yesterday and it was the day before yesterday. This is Thursday. It was Tuesday.

Q. Last Tuesday? A. Tuesday afternoon.

Q. That would be the 12th?

A. Tuesday afternoon they were taken. I have the negatives right here.

Q. I see. And will you tell us what this photograph portrays? A. This photograph——

The Court: This is looking west?

Mr. O'Donnell: This is looking west, yes, sir.

Q. This is looking west? A. Yes, sir.

Q. That is, looking west on Fremont Extension?

A. Yes, sir.

Mr. O'Donnell: I showed those to you, did I not? Yes.

Mr. Scholz: Yes.

Q. How far west of Park Avenue were you standing when this photograph was taken?

A. As near as I could figure it out, I paced it off at 100 feet; in other words, I figured two paces to the foot.

Q. About 200 paces? A. 200 paces.

Mr. O'Donnell: I would like to introduce this into evidence for the purpose of the record.

(Testimony of Edwin H. Hartshorn.)

The Clerk: Plaintiff's Exhibit 23 in evidence.

Q. Referring to Plaintiff's Exhibit No. 23, there is on the right hand side of this photograph the picture of a portion, the front portion of a machine coming out from a side street, is that correct?

A. That, that vehicle sitting there is a 1929 Dodge.

Q. Is that your car?

A. No, it's a friend of mine. It was placed at, as near as possible to the accident, where the [97] accident was sitting.

Q. I see, and the position of that car as indicated in this photograph is approximately where the accident occurred in your opinion?

A. That's right.

Q. I see. A. As near as I could figure.

Q. In other words, that was the position of Mr. Penders' automobile? A. In—

Q. On Fremont Extension at the time of the actual impact, is that correct?

A. Yes, sir. Only his car, automobile would be turned in the opposite way.

Q. Opposite way. I see. A. Yes, sir.

The Court: Let me see that (to Clerk.).

Q. Now, as you drove east on Fremont Avenue at this particular time, other than Mr. Penders' car, were there any other cars traveling in the same direction? A. No, sir.

Q. There were not? A. No, sir.

Q. And other than the Army vehicle, were there

(Testimony of Edwin H. Hartshorn.)

any cars on the highway traveling in the opposite direction at that immediate time?

A. No, sir, I didn't see a one.

Q. So at the time of the accident, the south side of Fremont Avenue was clear of traffic, is that correct?

A. Yes, sir.

Q. What was the condition of the weather on that particular day, Mr. Hartshorn?

A. It was clear, as I remember, sir.

Q. And the accident, from the testimony here, happened about 6:40 or 6:30; was it light at that time?

A. Yes, sir. [98]

Q. You didn't have the lights of your car burning or anything?

A. No, sir.

Mr. O'Donnell: I think you may take the witness.

Cross-Examination

By Mr. Scholz:

Q. Mr. Hartshorn, what was your purpose in taking the photograph indicating the Plaintiff's Exhibit No. 23?

A. I took the photograph on my own accord. Nobody, I just out of curiosity's sake, I just wanted to see how far you could see down that street.

Q. Now, isn't it a fact that you discussed this matter with Mr. Penders several times before this case came up for trial?

A. No, I—Mr. Penders was down to see me one time, that's all. Mr. Penders, no, I never discussed it with Mr. Penders at all.

(Testimony of Edwin H. Hartshorn.)

Q. You discussed it——

A. Mr. O'Donnell? Is that not your name? You came down one time.

Mr. O'Donnell: Yes, sir.

Q. You have a perfect right, but simply out of curiosity you went out and took this photograph?

A. I did myself; yes, sir.

Q. For the purpose of being able to testify here today? A. That's right.

Q. And you knew that you were going to be called by the plaintiff as a witness in this case?

A. Yes, sir.

Q. I show you herewith a copy of an affidavit certified as a true copy, purporting to have been signed by you on May 13, 1946, and you recall I think that I showed it to you? A. Yes, sir.

Q. ——and you stated that it was a true statement? A. That's right.

Mr. Scholz: Now, if Your Honor please, I offer this in evidence for the grounds of impeachment as Defendant's Exhibit next in order. I think it's C.

The Court: C.

The Clerk: Defendant's Exhibit C in evidence.

Mr. O'Donnell: Did you show that to Mr. Hartshorn during recess?

Mr. Scholz: Yes. Do you want to see it again? Better show it to him again, and will you read that to be sure that that's——

The Witness: Yes.

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: —a true statement?

Q. And that was made two days after the accident?
A. I believe it was.

Q. Do you recall what date the accident happened?
A. It was May 11th.

Q. 1946?
A. That's right, sir.

Q. And this was made on May the 13th, 1946. Now, at that time you stated that the sedan which was operated by, you testified operated by Mr. Penders was about a hundred feet west of Park Avenue when he made a signal for a left turn and at the same time slanted diagonally into the middle lane of the opposite half of the highway, is that correct?
A. That's right, sir. [100]

Q. This intersection here is a little broad at the mouth of it, that is, Park Avenue is a rather broad intersection—I think we stipulated about 90 feet, is that correct?
A. Yes.

Q. Now, will you come down here and indicate—(witness steps down)—may I have your ruler, Gene? There is 20 feet. One inch equals 20 feet. You understand that, don't you?
A. Yes.

Q. Now, from this here, indicate a hundred feet west of the intersection where he made the turn into the middle lane of the opposite path.

A. This impact here, sir?

Q. No, a hundred feet west of Park Avenue.

A. You want to indicate it from here?

Q. No, this is west. You understand this is east?

A. That's right. That's right.

(Testimony of Edwin H. Hartshorn.)

Q. And here is the mouth. A hundred feet west, now. Will you make a mark there?

A. O.k. 20 feet.

Q. A hundred feet would be five inches.

A. That's right, would be five inches.

Q. Well, don't make it diagonally.

Mr. O'Donnell: You better make it straight.

Q. You stated a hundred feet back?

A. That's right, sir.

Q. Well, now, you are making it diagonally. Let's make it this way.

A. O.k. Right here. This is——

Q. All right. Now will you indicate on this diagram the point where Mr. Penders turned and went over the double line?

A. Where he turned—— [101]

Q. Where he turned to go, turned and slanted into the west lane or—the west lane, yes—the lane for vehicles going west.

A. That's right. I should say it was around there.

Q. Well, now, indicating there, you have got your mark there. Don't slant it now. Make it right here.

A. All right.

Q. Now make a mark there where you stated in your statement.

A. All right.

Mr. O'Donnell: Wait a minute. He wasn't over there.

Mr. Scholz: No, that's—straight across there and mark it where it was. Now we will make this mark, call that D-1, Your Honor.

(Testimony of Edwin H. Hartshorn.)

The Court: That's it. Why don't you call it H-7?

Mr. Scholz: H-7.

Q. Now, H-7, Mr. Hartshorn, is where Mr. Penders crossed the double line and got into the west-bound traffic lanes, is that correct?

A. That's right, about a hundred feet below.

Q. About a hundred feet below. Now will you take the stand, take your seat, Mr. Hartshorn? (Witness resumes seat.) Mr. Hartshorn, you never saw me before today, did you? A. No, sir.

Q. And the first time you saw me was in the courtroom this morning? A. Yes, sir.

Q. And I asked you to come up to the office of the United States Attorney? A. Yes, sir.

Q. And I stated to you all we wanted was the truth, nothing but the truth?

A. That's right, sir. [102]

Q. And I said we were not interested, the United States was not interested in winning the case or losing the case? A. Yes, sir.

Q. Just interested in presenting the facts to the Court? A. Yes, sir.

Q. Now, you recall I showed you a diagram? Do you recall my showing you this diagram?

A. Yes, sir.

Q. And I show you here a diagram marked 1 and 2? A. Yes.

Q. Purporting to be, I assume, automobiles?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. And ask you if that was your recollection of where the accident occurred and you stated "yes"?

A. Yes, sir.

Mr. Scholz: I will offer this in evidence, if Your Honor please, as Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit D in evidence.

Q. And do you recall I asked you if those vehicles were moved by the impact and you stated to me it was eight or ten feet?

A. That's right. Eight or ten or fifteen, I didn't know for sure, that's my—

Q. No, you didn't know for sure but you stated eight to ten? A. Eight to ten.

Q. And not fifteen feet, as you testified here?

A. Well, I thought it was ten or fifteen, I wasn't sure.

Q. Well, what did you state to me?

A. Eight or ten.

Q. Now, on direct examination, Mr. Hartshorn, you stated that the Penders automobile—what kind of automobile was he driving?

A. I believe it was a Hupmobile, sir. [103]

Q. 1934 Hupmobile?

A. That's right, I don't know the year.

Q. Hupmobile?

A. It was a Hupmobile, that I know. It was a Hupmobile.

Q. And what kind of vehicle was that Army vehicle?

A. I do believe they call it in the Army a carry-all.

(Testimony of Edwin H. Hartshorn.)

Q. And how many passengers does that carry?

A. I should say between eight and ten.

Q. Are you familiar with that type of an automobile?

A. Well, as near as I can figure now, I don't recall now, some of them carry less, some carry more. I never counted the passengers in a vehicle but that is what I would say they carry, eight or ten.

Q. And that vehicle is noted for being top-heavy, is it not? A. Yes, it is.

The Court: What is that last question?

Mr. Scholz: And it is noted for being top-heavy.

Q. Now, on direct examination you testified that you first saw what you afterwards found out to be the Penders car, it was ahead of you on the outside lane going east, is that correct?

A. Yes, sir.

Q. And that was back how many feet from the intersection of—

The Court: What's the name of the street that comes in there?

Mr. Scholz: Augussita. Should I insert it in there, Your Honor? Would that be agreeable to you?

Mr. O'Donnell: Sure, go ahead, never spell it (laughing). [104]

The Court: Can you pronounce it?

Mr. Scholz: Augussita.

The Court: What?

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: Augussita. A-u-g-u-s-s-i-t-a.

Q. How many feet east of Augussita was your car and the Penders car when you first saw the Penders car?

A. I should say about 400 feet.

Q. About 400 feet, and you were both, the Penders car was ahead of you——

A. That is correct.

Q. Is that correct? A. That's right.

Q. Did he cut in ahead of you?

A. No, sir.

Q. How did he cut in?

A. He was ahead of me. I caught up with him.

Q. Oh, I see. And in that car there were four elderly persons? A. Yes, sir.

Q. And in the front seat was Mr. Penders?

A. Well, I didn't know at the time. There was a man driving at the time. I couldn't tell whether it was a man and woman in the front seat or what they were until after the accident occurred.

Q. I see.

A. But I knew there was a man driving.

Q. And then you proceeded east on Fremont Extension or Fremont Street as designated here—did you pass the Penders car?

A. No, sir; I never passed it at all until the accident.

Q. You kept behind the Penders car?

A. Yes, sir.

Q. And when it reached Augussita Road, you were still behind it? [105] A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Approximately how many feet?

A. Well, I kept slowing up all the time. I should say by the time it happened, I was——

Q. No. Now listen to my question.

The Court: He started to answer. He was going to say, I would say at the time it happened.

Mr. Scholz: I mean he——

The Court: Don't write this, Miss——

Mr. Scholz: Will you read the question? (Question read.)

Mr. O'Donnell: I think you better reframe your question.

Mr. Scholz: I'll reframe it, yes.

Q. As the Penders car reached the intersection of Augussita Road and Fremont Road, your car was still behind the Penders car?

A. Yes, sir.

Q. About how far back?

A. I should say approximately 150 feet.

Q. 150 feet? A. Yes.

Q. Then at the point indicated here by H-7, the Penders car slanted over the double white line to the north side of the road? A. Yes, sir.

Q. And at that time how far back were you?

A. Well, I couldn't tell, I should say, no, that wouldn't, it wasn't the same distance, it's hard to measure it on that map, it doesn't [106] look right on that map.

Q. Without looking at the map, approximately how far would you say it was?

(Testimony of Edwin H. Hartshorn.)

A. I would say about a hundred feet.

Q. A hundred feet back and when he slanted across the double white line to the north side of the road, did you at that time see the Army vehicle?

A. Oh, yes. After he had crossed, after he had crossed the double white line, did you say?

Q. After he slanted in, after he got over the white line, where you've got H-7, did you see the Army vehicle?

A. No, not at the time, no, I didn't, not at the time he crossed over. No, I didn't.

Q. Now, he proceeded in a slanting direction towards Park Avenue, did he not?

A. Yes, he did, sir.

Q. Now, would it be fair to indicate that he proceeded in a direction as indicated by this pencil?

A. Well, no, it doesn't look like that to me, he was farther up, to me, it looks like he was farther up towards the intersection before he crossed the double white line.

Q. Did you notice the pole up here?

A. A light pole; yes, sir, along the bank.

Q. That is approximately 80 or 90 feet from the intersection of Park Avenue and Fremont, is it not?

A. I should say so. There is one on top of the hill at Park Avenue.

Q. No, I am talking about this one here right now.

A. Yes, sir, I know where it is. On the other side of the intersection. [107]

(Testimony of Edwin H. Hartshorn.)

Q. Yes. And what do you mean by the other side of the intersection?

A. There is one over on the corner where those buildings, and then there is another one on the other side of the intersection, the same side of the street.

Q. I agree with you, Mr. Hartshorn, but I am talking about this pole now. A. That's right.

Q. Which is just almost directly on a prolongation of the east lane of Augussita Road?

A. That's right.

Q. To the edge of the sidewalk there?

A. That's right.

Q. And from about that. Now, you remember that pole? A. I remember that pole, sir.

Q. Now, he started across, slanting toward the north side of the road before he reached that pole, did he not?

A. I should say just about where that pole was as near as I can figure.

Q. Then your H-7 indicates the true position, does it not?

A. I think it does as far as that's—

Q. Now, he proceeded towards—at a slant towards Park Avenue, did he not?

A. Yes, he did.

Q. And would this be a fair interpretation of how he proceeded to drive before the impact according to my pencil I am holding there now?

A. Yes, he made, he made more of a round,

(Testimony of Edwin H. Hartshorn.)

round turn. It was a, it wasn't straight across, no. You couldn't say that.

Q. All right, then. Let's take it step by step. He was slanting when he crossed H-7, when he hit H-7, is that right? [108]

A. That's right. That's right.

Q. Now, did he go along on the inner lane on the north side any distance straight?

A. No, not at all, sir, not hardly at all. He just, right, right across.

Q. He just slanted right across?

A. That's right.

Q. Now, from H-7 how far had he traveled by the time he had reached the outer lane of the north part of Fremont Street?

A. He was practically up into the intersection right then.

Q. Well, now, will you indicate where in the intersection he was with your pencil, this pencil here? A. By the time I saw the vehicle?

Q. No, I am talking about where in the intersection he was. A. Or at the time——

Mr. Scholz: Will you read that question, Miss Reporter?

(Question read.)

Q. Now, this is the outer lane. This is the outer lane, isn't it, now? How far from H-7 had he traveled when he had traveled—how many feet had he traveled when he reached the outer lane, the north lane of Fremont Street, this lane right here?

(Testimony of Edwin H. Hartshorn.)

You see, this is the outer north lane right here. Just tell me how many feet without looking at the map.

A. Oh, about 30 feet, I guess, 30 or 35 feet.

Q. Thirty or 35 feet, all right. Now, 30 or 35 feet from H-7 would be about there, is that correct?

A. That's right.

Q. All right. Then he had reached here, he had traveled there [109] when he reached the outer lane, is that correct? The outer north lane. A. Yes.

Q. All right. We will make that H-8, indicating approximately the place he had reached on the north lane of Fremont Street. Will you take the chair again, please? (Witness resumes seat.) Now, you have already stated that when Mr. Penders' vehicle was at H-7, you did not see the Army vehicle? A. That's right, sir.

Q. Now, when Mr. Penders' vehicle was at H-8, did you see the Army vehicle?

A. Yes, sir, just right after he had crossed the first white line, I mean, the double white line into the outer lane.

Q. And that, he just crossed H-8, that is when he crossed into the outer lane?

A. That's right.

Q. And when he had reached that spot, then you saw the Army vehicle? A. That's right, sir.

Q. Now, tell me how many feet east of the intersection of Park Avenue and Fremont Street was this Army vehicle when you saw it?

(Testimony of Edwin H. Hartshorn.)

A. When I first saw it, it was, oh, I can't quite recall. It's, it was at the Shell station, that's where I first saw him, where I saw the Army vehicle from where I sat. Now, how many feet that is, I can't say. It's a good 200, 250, if not more.

Q. You say, now, what do you say, 200 or 250 or more, which is it?

Mr. O'Donnell: Not more, he says. [110]

Mr. Scholz: Or not more. I am asking him what he said. I don't know.

The Court: That is the same distance to which he testified on direct examination. I think 175 feet.

Mr. Scholz: Yes, he testified on direct examination 175 to 200 feet, that is correct, yes.

The Court: But he also said in front of the Shell station.

Mr. Scholz: That's correct.

Q. Now, you measured that distance, 175, 200 feet, from where? Where did you start to measure that? The mouth of this is approximately 90 feet.

A. You mean when I took the photograph, sir?

Q. No. A. Where, sir, saw the vehicle?

The Court: He wants to know 175 or 200 feet starting from where.

A. (Continuing): Starting from where. I was figuring from the intersection as you asked me the question. From the upper edge of the intersection.

Q. Whereabouts in the intersection?

A. I was figuring from the upper edge of the intersection right from the pole, we will go from the upper pole right by the building, that's right.

(Testimony of Edwin H. Hartshorn.)

Q. There's a pole on the northeast corner of the intersection, is that correct?

A. That's right, sir.

Q. And you figured that the Army vehicle was 175 to 200 feet [111] east——

A. East.

Q. ——of that pole when you first saw it?

A. That's right, sir.

Q. Now, Mr. Hartshorn, you traveled that daily, did you not?

A. Yes, sir, seven trips a day.

Q. And you are very familiar with that road?

A. I am, sir.

Q. Now, isn't it a fact that this road, Fremont Street, up to the intersection of Park Avenue, up to the east line of Park Avenue, extension of the east line of Park Avenue is uphill?

A. Yes, sir, it's a little incline but I can still see over it.

Q. It is a fact that it is about 20 or 30 degrees?

A. I don't think it's that much.

Q. Well, what is the percentage grade there? Do you know what I mean by percentage grade?

A. Yes.

Q. 4% grade, 10%. 10% grade would be——

A. I would say not quite 10%.

Q. You say only 10%?

The Court: He said not quite 10%.

Q. Not quite 10%. And then that still continues uphill a little ways on the east side, I mean prolongation of the east side of Park Avenue, does it not? The uphillness or grade still continues

(Testimony of Edwin H. Hartshorn.)

east of the prolongation of the east side of Park Avenue, does it not?

A. I would say, sir, that it ends just about at that intersection right there at the top. That's the top of the hill. Right in the course of the turn. [112]

Q. You mean where the pole is?

A. That's right, sir, right directly across the street.

Q. And you state now it doesn't still go further—

A. Back.

Q. Go further east? A. No, sir, it doesn't.

The Court: Mr. Scholz, I think I will have to take an adjournment now because I have to be in Oakland.

Mr. Scholz: Oh, yes, I forgot.

The Court: Ten o'clock tomorrow.

Mr. O'Donnell: What are we going to do about tomorrow?

The Court: Afternoon we will adjourn. How long do you expect this case will take?

Mr. Scholz: If Your Honor please, this case has been set for trial numerous times—I think September 17, November 17, November 29, January 6—I have a witness coming from Portland, Oregon, and as soon as I found out from your Clerk that we were definitely set, I wired him. Now, I will have to—

The Court: Well, we can cross that bridge—

Mr. O'Donnell: Oh, yes. We will be finished tomorrow.

The Court: By noon then tomorrow.

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: I hope so.

The Court: Because otherwise I want to adjourn at noontime because it is Good Friday.

(Adjourned at 3:25 p.m. to following day.)

Friday Morning Session

April 15, 1949, 10:00 o'Clock

The Clerk: Penders v. The United States, for further trial.

Mr. Scholz: That is ready for the Government. I believe that Mr. Hartshorn was on the stand.

EDWIN HARTSHORN

resumed the stand.

Cross-Examination

By Mr. Scholz:

Q. Mr. Hartshorn, I believe you stated that you were driving a bus on Fremont Street there daily for some time prior to the accident.

A. That is right, sir.

Q. And also some time after the accident, is that correct?

A. Yes, sir.

Q. Do you know what the speed limit was at the time of the accident on Fremont Street?

A. Thirty-five miles per hour at that particular place.

Q. Thirty-five miles per hour?

A. That is right.

Q. You are sure of that?

A. Yes, sir.

Q. Now, at the time of the impact and imme-

(Testimony of Edwin H. Hartshorn.)

diately after the impact the government vehicle driver remained in the car?

A. Yes, sir, both of them did.

Q. Then your statement the other day that the—part of the seat was there, wasn't any implication it was thrown out by the impact, is that correct?

A. I didn't catch that one.

Mr. Scholz: Would you read the question?

Mr. O'Donnell: Do you understand that question?

The Witness: Not quite.

Mr. Scholz: I will reframe the question.

Q. It was your testimony the other day, or there was in my mind an implication that part of the driver's seat of the government vehicle was thrown out by the impact. That is not true, is it?

A. No, sir.

The Court: What do you mean, that the implication is not true?

Mr. Scholz: Pardon me.

Q. You mean that the government seat wasn't thrown out by the impact of the two vehicles?

A. Yes, it was, sir, the seat was thrown out. I didn't understand your question.

Q. Didn't you just state just a few minutes ago prior to this question that the government driver remained in the government vehicle at the time of the impact and immediately thereafter?

A. Yes, sir.

Q. Was that the seat that the driver was seated upon?

(Testimony of Edwin H. Hartshorn.)

A. That I couldn't tell you, sir. I didn't pay much attention to the government vehicle. I noticed that the men in the [115] government vehicle—the man in the vehicle wasn't hurt as bad as the other car. I paid more attention to them.

Q. Now, this road at the intersection of Park Avenue and Fremont Street curves to the north, does it not? A. Going west?

Q. Going west, that is correct.

A. Yes, sir.

Q. Would you indicate to the extent, in your opinion,—Strike that out. Do you know what, how many degrees it curves to the north?

A. No, I don't, sir.

Q. Approximately?

A. No, sir. I don't. It is slight, it is a very slight curve.

Q. You indicated in your testimony yesterday that when you were 100 feet west of H-7 you saw the government vehicle approximately 175 to 200 feet east of the westerly extension of the curb line of Park Avenue, is that correct?

A. That is right, sir.

Q. Now, as a matter of fact, in the vehicle you described that you were driving at that time, it would be impossible to see a vehicle such as the government vehicle, which you saw, at that distance.

A. You can see it, sir.

Q. Now, you stated that the—that the government vehicle—I mean,—Strike that. You stated

(Testimony of Edwin H. Hartshorn.)

that Mr. Penders' vehicle [116] crossed the white line, commenced to cross the white line at H-7.

A. There is one subject I would like to bring up on that there.

Q. Just answer my question. A. Yes, sir.

The Court: Let him explain. He said he wanted to explain something.

A. When we measured that yesterday, I was measuring—when you speak about that, I would like to bring it out if I may. When I was figuring from that, measuring from that, I am figuring from the intersection as to where the collision happened.

The Court: I don't understand that.

The Witness: Well, sir, I would like—

Mr. O'Donnell: Can you show on the map what you meant?

Mr. Scholz: Just a minute. I suggest you take that on cross-examination.

Mr. O'Donnell: The Court asked the question.

The Court: I just said I didn't understand the witness' last statement.

Mr. O'Donnell: Would Your Honor want him to demonstrate at this time?

The Court: Read it back to me.

(Answer read.)

The Court: I don't understand that. [117]

Q. (By Mr. Scholz): Let me ask you a few questions. In your statement, in your affidavit which has been offered in evidence here, you stated that "A sedan was traveling the same direction as I when about 100 feet west of Park Avenue the driver

(Testimony of Edwin H. Hartshorn.)

signalled for a left turn and at the same time slanted diagonally into the middle lane on the opposite side of the highway." Is that correct?

A. That is right, sir.

Q. Now, then, it was 100 feet west of Park Avenue, is that correct?

A. That is right, sir. I am figuring from the intersection.

Q. At the time that he slanted to the wrong side of the highway? A. That is right, sir.

Q. Now, when the Penders automobile slanted to the wrong side of the highway, it went into the lane on the wrong side nearest to the double line, is that correct? A. That is right.

Q. And it continued slanting towards the outer lane on the wrong side, that is, the north side of the highway?

A. That is right, right into the intersection of Park Avenue.

Q. And therefore it would be slanting in this direction, is that correct (indicating with my pencil)?

A. No, sir, that is what I was trying to bring out, the point there— [118]

Q. (Interrupting): The answer is no, it wouldn't be slanting in that direction? A. No.

Q. Would it be slanting in this direction?

A. Yes, sir.

Mr. O'Donnell: I submit, may it please the Court, that the witness should be allowed to show on

(Testimony of Edwin H. Hartshorn.)

the map himself what direction he was referring to rather than have Mr. Scholz show it.

Mr. Scholz: I think he is an adverse witness. Incidentally, the Government did subpoena him, but you produced him as a witness and I think that this is cross-examination and on cross-examination we are allowed a wide latitude if I am not mistaken.

The Court: That is correct, but the witness on the other hand is desirous of explaining what he meant by yesterday's testimony. As I understand him to say, he places that 100 feet in from the— from where it was placed on the map, but from closer in, measuring from the middle of the intersection of Park Avenue, is that correct?

A. That is right; that is where I was figuring from.

The Court: Where is it measured from on the map?

Mr. O'Donnell: From the curb line.

Mr. Scholz: It was measured from the curb line.

Mr. O'Donnell: The west curb line of Park Avenue. [119]

Mr. Scholz: That is correct.

The Court: In other words, that would bring it up closer to Park Avenue.

Mr. O'Donnell: That is correct.

Mr. Scholz: That would bring it—have you got a ruler?

Mr. O'Donnell: The Clerk has a ruler.

(Testimony of Edwin H. Hartshorn.)

Q. (By Mr. Scholz): In view of your statements just now, Mr. Hartshorn, would you step down to this diagram and indicate on this diagram the position you now place the car?

A. Yes, sir. Figuring yesterday, sir, I was figuring from the accident—where the accident happened, and I was figuring—I mean, this is where—I am figuring from the center of the intersection as to where Mr. Penders was hit.

Q. Now, please, listen to me carefully and place on this diagram by a dot the position of the Penders car when he first crossed the double white line.

A. I should figure about 100 feet which would be from here, I would say,—

Mr. O'Donnell: A little louder. Just a minute before you answer that. I think it should be marked—never mind. Do it so it will be marked bearing in mind that the scale is one inch for every 20 feet and your distance is 100 feet from the intersection.

Mr. Scholz: Just a minute. Is there any objection to the question? [120]

Mr. O'Donnell: I just want the witness to be straightened out here in his testimony.

Mr. Scholz: So do I. That is exactly my purpose, to straighten him out.

Mr. O'Donnell: I want him to use the ruler and make his mark.

Mr. Scholz: He understands it.

Q. You looked at this diagram yesterday, didn't you?
A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. —before court you looked at it this morning?
A. Yes.

Q. And you discussed the matter this morning?

A. Yes.

Q. With Mr. Penders?

A. Yes, sir. I figured from the intersection as to where—here is your place.

Mr. O'Donnell: Just a minute. That doesn't mean anything, Mr. Hartshorn. Will you start that over again so that we can—

Mr. Scholz: Let's let him testify and we will straighten him out. If I can't straighten him out, you can.

Mr. O'Donnell: I beg your pardon.

The Witness: I would figure where he started to cross over was right in here.

Mr. O'Donnell: Will you mark that?

Mr. Scholz: Make a little dot, will you, Mr. Hartshorn? [121]

Mr. O'Donnell: Will you mark that H-9?

Mr. Scholz: All right, you may resume your stand in the chair.

Q. Now, at that time you stated yesterday that your vehicle was approximately 100 feet in the rear of Mr. Penders' car, did you not so state?

A. Yes, sir, in the outer lane.

Q. And at that time you told me also that your car was west of the intersection of, it looks like Esther Road and Fremont, is that correct?

A. That is right, sir.

(Testimony of Edwin H. Hartshorn.)

Q. —approximately 100 feet, is that correct?

A. Well, it was close to that. Right around there somewhere. It was close to the intersection, we will say.

Q. Now, at the time that Mr. Penders' car slanted into the wrong side of the road and by that I mean the north side of the road, you first noticed the government vehicle?

A. When it first crossed the double white line?

Q. Will you read my question?

(Question read.)

Mr. O'Donnell: Is slanted a proper word? Is that correct?

The Witness: No, sir, he cut across the double white line into the intersection, fairly square into the outer lane.

Q. (By Mr. Scholz): Well, will you let me call your attention to your affidavit which was made on May 13, 1946. The third paragraph. At the [122] time—let's see, "the driver signalled for a left turn and at the same time slanted diagonally into the middle lane on the opposite side of the highway." Is that a correct statement?

A. That is right, sir.

Q. Then he did slant? A. He did.

Q. Now, Mr. Reporter, will you read my question again that has not yet been answered?

(Question read.)

A. Well, just as soon as he crossed into the outer lane.

(Testimony of Edwin H. Hartshorn.)

Q. At the time, at the time, I asked you. Will you answer that question? A. No.

Q. Let me call your attention to your affidavit. "At the time of signalling, the driver was in the middle lane of the right half of the road at this instant I noticed travelling toward Monterey an army vehicle." You made that statement?

A. Yes, sir.

Q. Is it a correct statement?

A. Yes, sir. He cut—as he cut into the intersection—as he started to cross into the outer line is when I noticed the car coming, the army vehicle.

Q. You also made the statement that the—this vehicle, referring to the army vehicle, in my opinion. To be traveling at approximately 35 or 40 miles per hour. May I have this [123] affidavit to show him, if Your Honor please?

"I noticed traveling toward Monterey an army vehicle. This vehicle, in my opinion, appeared to be traveling at approximtaly 35 to 40 miles per hour."

You made that statement? A. Yes, sir.

Q. Was it true?

A. Well, sir, to that I couldn't tell you. I will be——

Q. You mean to say you made a false statement under oath?

A. Sir, when that statement was written up, it was right after the accident.

Q. No, it wasn't right after the accident. I beg

(Testimony of Edwin H. Hartshorn.)

to correct you, it was written on the 13th day of May 1946 and subscribed the 13th of May.

A. Well, at the time it was written up, the officer that made the statement up—at the time it was written, he asked me the questions and then he wrote the statement up and I signed it.

Q. Did you read it over before you signed it?

A. I believe I did, sir.

Q. And that—the matter of this accident was freshly in your mind on the 13th day of May 1946 then, fresher than on the 15th day of April 1949, wasn't it?

A. Yes, it was.

Q. Now, did you make this statement:

“Owing to the road contour, I knew that the operator of the [124] army vehicle could not possibly have seen the hand signal given by the civilian nor could he have until he topped the rise and seen the civilian vehicle proceeding towards him.”

A. That is right, sir. He couldn't. He could see the vehicle but he couldn't see his hand signal.

Q. He couldn't see his hand. You also stated:

“Nor could he have until he topped the rise see a civilian vehicle proceeding towards him.”

You made that statement?

A. I believe I did, sir.

Q. It is true?

A. Well, I would say it is but you can see the vehicle, though, there is no getting around it.

Q. Well, now, will you——

Mr. O'Donnell: That is what he said.

(Testimony of Edwin H. Hartshorn.)

Q. (By Mr. Scholz): You just stated there that you made the statement that due to the contour of the road the army vehicle driver could not see the civilian vehicle until he topped the rise and you said that was a true statement.

A. That is right, sir, the way——

Q. (Interrupting): Now, is that correct?

A. Taking it from the way I saw the vehicle and the way the driver was going, I knew he couldn't see the man, see the other car. Whether they were talking in the car I couldn't tell you.

Q. When you say they were talking in the car—— [125]

A. ——whether the men were talking in the army vehicle or not, I couldn't tell you. I couldn't see the car until I got right on it because the way the car was going you could tell he didn't see the vehicle.

Q. He couldn't see it?

A. You could see it if you was on the highway. Now, if you was coming in there in the bus, riding on the seat you could see it, yes.

Q. Is this statement that you made on the 13th, this sworn statement you made on the 13th day of May 1946 true in this respect:

“That due to the road contour——”

Mr. O'Donnell: Pardon me, Mr. Scholz. Have you got another copy of that so that you can let the witness follow you?

Mr. Scholz: Would you like to follow me, Your Honor, too, on this extra copy?

(Testimony of Edwin H. Hartshorn.)

Q. Now, again I call your attention to this statement:

“I noticed traveling towards Monterey an army vehicle. This vehicle, in my opinion, appeared to be traveling approximately 35 or 40 miles per hour. Owing to the road contour, I knew—I know that the—I know that the operator of the army vehicle could not possibly have seen the hand signal given by the civilian nor could he have until he topped the rise and see the civilian vehicle proceeding towards him.” [126]

You made that statement, did you not?

A. Yes, sir.

Q. It is true, is it not? A. Yes.

Q. Now, the rise, the top of the rise is right here, is it not (indicating), generally that section of the road?

Mr. O'Donnell: I think the testimony is there is a pole there at the corner:

The Witness: That is what I would think.

Q. (By Mr. Scholz): Is that the top of the rise?

A. Yes.

Q. Indicating there on the diagram a place marked Pole and with a circle near it, near the eastern property line—the eastern curb line of Park Avenue and the northern curb line of Fremont Street. And now, that is the top of the rise, isn't it?

A. Yes, sir.

Q. In other words, then, due to the contour of the road until the army vehicle had reached this

(Testimony of Edwin H. Hartshorn.)

point marked and indicated here before and marked with the pole, he could not see that civilian car in the place where it was?

A. Well, he could see it, sir. I made the statement but he can still see it. I would say that he can still see the car.

The Court: Well, when you were back 100 feet behind the place where the civilian car started to turn into the north lane, [127] you could see, as I understand it, you could see the government car about 175 to 200 feet back?

A. Yes, sir, I could.

The Court: And you were sitting in the position where your eyes were about eight feet above the ground?

A. That is right, sir. I measured the bus, I measured the clearance of the bus, my vision clearance with a ruler. My manager and myself measured it in the shop.

The Court: If you could see him from that distance back, why wouldn't he see the car before he reached the top of the rise where the pole is?

A. Well, I was taking it from the way he was driving, sir, he didn't see the car. That is the way I meant the statement to mean that he didn't notice it, you could tell by the way the man was operating the vehicle that he didn't see the car in the intersection. When this statement was taken, it was taken in a hurry, it was made up in about three minutes.

(Testimony of Edwin H. Hartshorn.)

The Court: You didn't write that statement out yourself?

A. No, sir, I didn't write the statement out myself.

The Court: It was written out for you?

A. It was written out for me and I signed it.

Q. (By Mr. Scholz): You read it over before you signed it?

Mr. O'Donnell: He testified to that.

Q. (By Mr. Scholz): And it was correct, to the best of your ability at that time, that you signed it?

A. Yes, sir, the officer came in the house—came up to the door. In fact, he didn't even come in, he just came to the door and handed it to me and asked me if I would read it and sign it.

Q. Do you mean to say he typed it up—

A. (Interrupting): No, sir, he didn't type it up. He asked me the questions—he asked me the questions, he just took notes on it and he wrote it up. I was busy shaving at the time and getting ready to go to work. I had to go to work in the afternoon and he wrote it up. He sat in his army vehicle station car out in front of the house. I was staying in cabin 49 at the 17 Mile Drive Cottage Court. When he sat there in the vehicle and wrote it up,—down in his book then when he got done he handed it to me and I signed it. He came to the door and I signed it.

Q. But you read it over before you signed it?

A. Yes.

(Testimony of Edwin H. Hartshorn.)

Q. You were not interested in the case at that time at all?

A. I wasn't interested. It didn't concern me. I didn't feel it concerned me at all.

Q. But when you read it over, it was correct as far as you know? A. That is right, sir.

Q. Now, as the Penders car slanted across the double line into the north side of the highway, you stated you saw the government [129] vehicle?

A. Yes, sir.

Q. In what lane on the west bound traffic was it, was the government vehicle when you saw it?

A. When I saw it, he was on the outside lane.

Q. That would be the north lane?

A. The north lane going west.

Q. The north lane going west?

A. That is right, sir.

Q. Was he proceeding straight down within the two lines designating the north lane going west?

A. Yes, sir.

Q. Then what happened next to the government vehicle?

A. Well, as soon as he noticed the—as soon as he noticed the car when he topped the hill, he jammed on his brakes, the truck started to swerve, the back end of it did, back and forth.

Q. And did he attempt to swerve to the right to avoid Mr. Penders' car?

A. Well, the truck, I think, automatically went that way. The rear end went to the outer—the inner

(Testimony of Edwin H. Hartshorn.)

lane and the front wheels stayed towards Park Avenue going west.

Q. Now, you say the rear end went to the outer lane. I don't think you mean that, do you?

A. I mean the inner lane, excuse me.

Q. Did you notice him swerve to avoid Mr. Penders' car? [130]

A. I personally think it was the brakes that made the car go like it did.

Q. Will you answer my question, if you know? Will you read the question?

(Question read.)

The Witness: Well, he was so scared—yes, he did in a way.

Q. I call your attention to your affidavit: "The operator of the army vehicle applied his brakes and swerved toward his right attempting evidently to avoid the sedan but was unsuccessful."

That is a true statement?

A. That is right, sir.

Q. Now, at the time that you observed the government vehicle, Mr. Penders' car was in the inner lane going east?

A. Not the full vehicle, sir. It was partly in the outer lane and in the inner lane, too, when I noticed the vehicle.

Q. When you noticed the army vehicle Mr. Penders' car was partly in the inner lane and partly in the outer lane going east? A. Yes, sir.

(Testimony of Edwin H. Hartshorn.)

Q. Mr. Penders' car kept on pursuing the same direction that he was going, did he not?

A. Yes, sir.

Q. He did not stop or swerve back to the right or left?

A. Not until he saw—not until the vehicle started to—applied [131] his brakes. You could hear the squeal of the wheels.

Q. Where was the position of the government vehicle when you heard the squeal of the brakes? Will you indicate it on this diagram?

A. Yes, sir.

Q. Use your ruler so it will be in accurately.

A. It was, I should say,—

Q. (Interrupting): Before you make the spot there, you had better check it with your ruler.

A. I was just figuring from the poles here.

Q. One inch is 20 feet.

Mr. O'Donnell: Put up the ruler up there at the pole.

A. And figuring from where Mr. Penders' car—

Q. (By Mr. Scholz): Let me ask you this question: Was it, at the time you heard the squeaks, the government—was the government car east of the pole? A. Yes, sir.

Q. Approximately how many feet?

A. Oh, I should say he was approximately 75 feet.

Q. 75 feet? A. That is right.

(Testimony of Edwin H. Hartshorn.)

Q. Will you mark on the diagram, then, using your ruler so you get the scale, the position of the government vehicle when you heard the squeal of the brakes?

The Witness: It would be about an inch and a quarter. [132]

Mr. O'Donnell: No, it would be more than that.

The Witness: It would be an inch and three-quarters.

Mr. Scholz: No, one inch is 20 feet and you said 75 feet, didn't you? A. Yes.

Q. 20, 40, 60—that is three and a half inches.

A. That is right, three and a half inches, that is right.

Q. Now, wait a minute now before you mark the three and a half inches. Have you got that spot there now? A. Yes.

Q. Now, also indicate——

A. (Interrupting): You want it figured from the pole?

Q. I don't want to figure it any way. I wasn't there. I want you to testify to what you saw.

A. Well, what I want to figure from is while I was trying to get is a definite place where we are figuring from.

Q. You stated it was 75 feet east of the pole, is that correct? Approximately 75 feet east of the pole? A. That is right, approximately.

Q. And that would be three and a half inches, would it not? A. That is right.

(Testimony of Edwin H. Hartshorn.)

Q. Now, also indicate at the same time where the government vehicle was in respect to the lanes.

A. He was in this lane right here.

Q. Now, that is your stop there. Now, will you make your [133] spot there? Now, was he running along the outer edge of the lane at that time?

A. He was running on this lane like this (indicating).

Q. I mean, where you have got your spot marked there.

A. He was running on this lane.

Q. Will you circle that and we will call that H—

The Court: H-9.

Mr. Scholz: H-10.

The Court: What is H-9?

Mr. Scholz: H-9, Your Honor, is—

The Court: Where Penders started to cross in the north lane.

Mr. Scholz: H-10, all right.

(The witness indicates.)

Q. (By Mr. Scholz): Now, at that time when you heard the squeak of the brakes which was designated as H-10, where was Mr. Penders' car?

A. He was right—pardon me, he was right in this intersection right here coming around.

Q. Will you indicate the spot on the diagram where his car was at the time you saw that?

A. Well, it was just about halfway across, right in here, right in the intersection.

Q. At H-11?

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: At the spot marked H-11? [134]

(The witness indicates.)

Q. (By Mr. Scholz): Will you take your chair again. Now, I think, Mr. Hartshorn, you testified that Mr. Penders crossed the white line in a slanting direction. A. Yes, he did, sir.

Q. And he continued to maintain that slanting direction until he was struck by the government vehicle?

A. Well, not right up to the—not right up to the impact. The minute he noticed him, he stepped on the gas and went over to this curb a little bit, trying—up into the intersection, trying to miss him is what he done.

Q. How do you know that Mr. Penders noticed the government vehicle?

Mr. O'Donnell: Just a minute. I move to strike that out as argumentative, may it please the Court.

Q. (By Mr. Scholz): Well, he said he knew.

Mr. O'Donnell: It is merely a conclusion.

Mr. Scholz: He said he knew Mr. Penders—knew, and I want to know what he knew.

The Court: I think that is a fair question.

A. I could tell exactly how he knew, sir, by the way the vehicle was on the side slant toward me. I was looking from—

Q. When you say "vehicle" you must remember you have got two vehicles. When you say "vehicle" which one do you mean?

(Testimony of Edwin H. Hartshorn.)

A. Mr. Penders' vehicle is the one we are talking about. [135]

Q. You knew Mr. Penders—you knew that Mr. Penders noticed the government vehicle because of the side slant?

A. No, sir, I was going to say he was at an angle from me.

Q. When you say "he" I don't know who you mean.

A. Mr. Penders.

Q. Mr. Penders was at an angle to you?

A. That is the vehicle we are talking about, Mr. Penders' vehicle was at an angle from me and I noticed he was at the same speed until his brakes—

Q. (Interrupting): What do you mean? The same speed.

A. He crossed the intersection and he stayed at about the same—about an average speed until he noticed—when I could tell he noticed the vehicle. Then his vehicle speeded up.

Q. Will you designate on the board the position where Mr. Penders' vehicle speeded up, started to speed up?

A. Yes, sir.

Q. Use your ruler again, will you please.

A. He was across this white line. He was crossing this white line, right here is where I noticed him.

Q. Wait a minute. Don't mark on the diagram please, until—Indicate the position that Mr. Penders' car was in when you saw his speed up, mark that.

(The witness indicates.)

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: We will call that——

The Court: H-11. [136]

Mr. Scholz: H-12, that is correct.

The Witness: H-12.

The Court: Yes, that is right.

Q. (By Mr. Scholz): Now, Mr. Penders,—did Mr. Penders keep right on that course he was following with the exception that he speeded up?

A. Yes, sir.

Q. Mr. Hartshorn, I show you herewith an affidavit purportedly made by Mose Adams also dated the 13th of May 1946. Do you recall reading that affidavit before? A. Yes, sir.

Q. Do you recall making the statement that that was correct as far as you knew?

The Court: Wait a minute. When and where? Lay the foundation for it.

Mr. Scholz: Yes.

Q. Do you recall me showing you that affidavit in the office of the United States Attorney yesterday afternoon? A. Yes, sir.

Q. And you read it at that time? A. Yes.

Q. Did you make the statement that that statement was correct?

A. Well, sir, as near as I can tell. His statement, I wouldn't know his statement. [137]

Q. Did you make the statement it was correct as far as you know?

A. That I don't remember.

Q. Do you recall me asking you if that statement

(Testimony of Edwin H. Hartshorn.)

was correct? That was only yesterday afternoon.

A. I don't remember whether you did or not, sir.

Q. Well, do you recall me giving you that statement?

A. Yes, you gave me a statement.

Q. Do you recall me asking you any questions about that statement?

A. You asked me quite a few different questions.

Q. Did I ask you any questions about that statement?

A. I do remember you asking me questions. What they were I don't remember.

Q. The question I asked you was that statement true as far you know?

A. I don't recall that, sir.

Q. Would you say that wasn't true?

A. No, I wouldn't say it was true because I don't recall it. I was up there——

Q. Well, Mr. Hartshorn——

The Court: Wait a minute. You interrupted him there.

The Witness: I don't recall it. I was up there talking to you. I don't recall just all that was said, no. We was busy talking away there. I wanted to get off and eat right at the time and I don't recall just what we all did say. [138]

Q. We weren't up there very long, were we?

A. No.

Q. How long, about five minutes?

A. About ten, I should say.

Q. About ten minutes. Now, will you read that

(Testimony of Edwin H. Hartshorn.)

statement over and see if it isn't correct as far as you know.

(The witness reads.)

A. As far as I know, it would be accurate all but for one thing. I didn't see the other car.

Q. You didn't see the other car.

A. I didn't see Moses Adams. As I told you yesterday—I do believe I told you that I thought Moses Adams was a sailor, was one of the Navy men. There was some Navy man came up there. At the time I didn't see any civilian vehicles there.

Q. But that statement is correct except you don't recall at this time seeing any other vehicle?

A. No, sir.

Q. The rest of it is correct?

A. That is right, sir.

Mr. Scholz: I will offer that in evidence. This is a carbon copy.

Mr. O'Donnell: I am going to object to that, if the Court please. It isn't his statement. It is made by another individual. He might use it for the purpose of impeachment of this witness to the extent it showed a difference of what was said [139] yesterday and what was said today in court, but as far as admitting the statement into evidence, it isn't binding on us. It is purely hearsay not made in our presence.

The Court: The statement is used to impeach this witness. I don't know what is in the statement,

(Testimony of Edwin H. Hartshorn.)

but if there is anything that conflicts with what this witness says, there is in the statement which he says now is correct except for—in one particular it would seem that that would be a valid impeachment.

Mr. O'Donnell: All right.

The Court: Let me examine this thing. There is no jury here anyway.

(The Court reads statement.)

The Court: I can't understand this statement.

Mr. Scholz: I can't make much out of it either.

The Court: It says here, "an army car after having passed me cut back into the righthand lane at no increase in speed. As I arrived at the start of the downgrade at Fremont Street near the intersection of Park Avenue, I noticed a green sedan which was at this instant in the right middle lane of the highway." Right middle lane of the highway, what does that refer to, going east or going west?

Mr. Scholz: That I don't know what it is either.

The Court: Then it says, "Headed for the right land." What the right land would be I don't know, apparently——

Mr. Scholz: I think that is merely a typographical error. [140] I think that is clearly, land means lane.

The Court: The right lane, but which right lane?

Mr. O'Donnell: I don't know.

The Court: Apparently for Park Avenue, seem-

(Testimony of Edwin H. Hartshorn.)

ingly attempting to go ahead of the oncoming car. I will admit the affidavit, but I don't——

Mr. O'Donnell: Now, do I understand it isn't put into evidence as to its content, may it please the Court, but purely for the purpose of impeachment?

The Court: That is right.

Mr. O'Donnell: I see.

Mr. Scholz: That is all.

(Thereupon statement was received in evidence and marked Defendant's Exhibit E.)

(Testimony of Edwin H. Hartshorn.)

DEFENDANTS' EXHIBIT E

State of California,

County of Monterey, Fort Ord—ss.

Moses Adams, Apt. #8, Wilshire Motel, Monterey, Calif, testifies, deposes and says:

Affidavit

Having been warned of my rights and that I could remain silent and that any statement I might make could be used against me and read at a Court Martial, I voluntarily make the following statement of my own free will and without threat or promise of reward or immunity:

“That at about 1830, 11 May 1946, I witnessed a motor vehicle accident in which an army vehicle, operated and occupied by two Military Policemen, and a sedan, of a faded green tone, operated and occupied by civilians, collided.

“Just prior to the collision the army vehicle had just passed me. As I was traveling at about 30 MPH, I would estimate the speed of the army car as being approx 35 and not over 40 MPH, as he traveled alongside of me for quite a distance prior to passing me. Furthermore, there was another vehicle which was traveling in the same lane and direction, towards Monterey, just ahead of the army car. The army car, after having passed me, cut back into the right hand lane at no increase in speed. As I arrived at the start of the downgrade

(Testimony of Edwin H. Hartshorn.)

of Fremont St. near the intersection of Park Ave, I noticed the green sedan which was at this instance in the right middle lane of the highway proceeding diagonally across Fremont, headed for the right land and apparently for Park Ave. and seemingly attempting to do so ahead of the oncoming army car.

“The collision happened so suddenly that further details are not all quite clear to me, but I recall seeing the army vehicle swerving to the right as though attempting to avert colliding with the sedan, but was unsuccessful.

“I then noted that several sailors nearby heading towards the collision, so therefore I did not stop but hurried to where I knew an ambulance was always standing and on arrival there notified them of the accident.”

/s/ MOSES H. ADAMS,
Apt. #8, Wilshire Motel
Monterey, Calif.

Subscribed to before me this 13th day of May 1946.

/s/ R. E. GUENETTE,
Capt, CMP.

A Certified True Copy:

/s/ HOWARD C. CURTIS,
Lt Col, CMP
Provost Marshal.

Incl #4

[Endorsed]: Filed April 15, 1949.

(Testimony of Edwin H. Hartshorn.)

Mr. O'Donnell: Is that all?

Mr. Scholz: That is all.

Mr. O'Donnell: Just one minute.

Redirect Examination

By Mr. O'Donnell:

Q. Now, to the best of your recollection, I think you testified yesterday there were no cars other than the Penders, the Penders' automobile traveling in an easterly direction along Fremont Extension.

A. No, there wasn't, sir, not between me and Mr. Penders.

Q. At that time you were in the outer lane of the eastbound traffic, is that correct? [141]

A. That I was, yes, sir.

Q. And other than the army vehicle which was traveling westerly there were no other cars in front of him?

A. There were no other vehicles, no, sir.

Q. Now, you tell us that you noticed the driver of the army vehicle turned to his right, is that correct? A. That is right, sir.

Q. —immediately preceding the accident?

A. That is right.

Q. And by turning to his right he was turning towards Park Avenue, isn't that correct?

A. That is right, sir.

Q. Did he make any attempt whatsoever at any time while he was within your observation to turn to the left?

(Testimony of Edwin H. Hartshorn.)

A. No, the car never turned to the left at all, sir.

Q. I see. Had he turned to the left, he would have avoided Mr. Penders' automobile, would he not?

A. That he would, sir.

Mr. Scholz: I object to that. You can't have this witness be your judge.

The Court: Sustained.

Mr. O'Donnell: I just got my habits from the way you were cross-examining him. I think that is all.

Mr. Scholz: That is all.

The Court: I wonder if I could ask the witness a question? [142]

Mr. Scholz: That's all right.

The Court: Q. When you signed this affidavit which was made up two days after the accident, May 13, where did this man interview you?

A. He interviewed me, sir, at the—yes, it was the Cottage Court.

The Court: Q. And you say that you were shaving at the time? A. Yes, sir.

Q. What did he do, just write notes down?

A. Yes, sir, he just asked me a few questions about the accident. He told me that he had seen this other Moses Adams, but he didn't say whether he was a civilian or a sailor or what he was.

Q. Well, after he wrote the things down that you told him, what did he do then, go and get—did he write the affidavit out there or—

A. (Interrupting) He wrote it out right there,

(Testimony of Edwin H. Hartshorn.)

yes, sir. I finished shaving and got ready for work, sir.

Q. You didn't swear to it before anybody, then, did you?

A. No, sir, I didn't swear to it before anybody. There was nobody around, just the officer himself.

Mr. Scholz: Well, that—may I ask a further questions?

The Court: Just a moment.

Q. Now, at the time you prepared that affidavit you used the expression about 100 feet west of Park Avenue was where this [143] Penders car started to slant into the—as you expressed it, into the east—the westbound—the westbound lane?

A. The Penders' car, yes, into the westbound, yes, that is right, sir.

Q. Now, are you sure—had you been out there to measure the thing off before you made the affidavit to see whether—

A. No, I hadn't at all. At the time the accident occurred I had a bus with 27 passengers at the time the accident occurred, that is the heavy time of day for passenger travel. There wasn't any automobiles on the road at the time and it was right after the war, as you recall. I had about 25 passengers on at the time.

The Court: Q. This 100 feet of yours is—was that just an estimate or a sort of a rough estimate?

A. That is right, sir, that is just my own opinion as I looked around the road and tried to control

(Testimony of Edwin H. Hartshorn.)

the bus and watch the accident at the same time.

Q. It might have been 50 feet or it might have been 150? A. That is right, sir.

Q. But your impression of it was, of what you observed was the man—go down and indicate on the board the path that that automobile, the Penders' car, took with regard to where—the 100 feet or anything else.

The Witness: The path that the Penders' car took?

The Court: Yes. [144]

The Witness: Right here was where I said he crossed. He just came around like this, and he continued on and right in here is where he was—right in here I believe it was *was* where the car collided, the two cars came together.

The Court: Well, he is pointing at a place called—somewhere near H-6. Well, in other words wasn't the slant from down there into there (indicating)?

A. No, this, I believe, was where we made the mistake yesterday, where we measured the five inches, from where the vehicles stopped down here and I was figuring—what I was trying to figure was from here to here.

The Court: All right, then, it would be from there that he came in like that? A. Yes.

Q. That is what you mean to testify?

A. That is what I meant.

The Court: That is all.

Mr. O'Donnell: That's all.

(Testimony of Edwin H. Hartshorn.)

Mr. Scholz: Now I have a few questions.

Q. Now, this officer of the United States army introduced himself to you at the time you made this deposition.

A. I don't know if he did. I can't remember, sir, whether he told me whether he was from the legal office or where he was from.

Q. You were in the army? [145]

A. Yes, sir.

Q. And you know what a corporal in military position is? A. Yes, sir.

Q. He was in a military position, wasn't he?

A. Well, I didn't know, sir. He was just dressed in officer's uniform. He didn't show me any identification or anything like that at all. As far as I know, he was just a lieutenant.

Mr. O'Donnell: A lieutenant?

The Witness: That is right.

Q. (By Mr. Scholz): How long were you in the army?

A. I was in the army for four and a half years.

Q. You were in the army for four and a half years and you don't know the difference between a lieutenant and a captain?

A. Well, I couldn't remember. Was he a captain, sir?

Q. That is all in evidence here.

A. Well, if he was a captain just from noticing, I haven't paid any attention to him at all, sir, whatsoever.

(Testimony of Edwin H. Hartshorn.)

Q. But he told you he was investigating this accident?

A. That is right, he said he would like to get a statement from me.

Q. And he asked you the questions?

A. He asked me the questions.

Q. And then he wrote down as you——

A. He put them in a notebook and took them out at the car. I was dressing at that time. It was only a one-room cottage. [146]

Q. I don't care about the one-room cottage, but I mean, did you—he wrote the questions down as you told them, is that right—the answers down as you told him?

A. Yes, he just asked me questions and he just jotted it down.

Q. And he told you the purpose of the discussion with you?

A. Well, I didn't know at the time they were going to fight the case. He just said that he wanted to get the questions that he wanted to ask me, that is all, and I just said——

Q. (Interrupting) Did he tell you he wanted to get the facts of this case?

A. That is right, and I just, I just answered him the best I could at the time on the little bit he asked me.

Q. Now, yesterday you stated that the impact of the two cars caused the cars to move from eight to ten feet, is that correct?

(Testimony of Edwin H. Hartshorn.)

The Court: No, he didn't. He made it at first 16.

Mr. Scholz: Yesterday——

The Witness: 10 or 15 feet, wasn't it?

Q. (By Mr. Scholz): Then I asked him he didn't make the statement eight or ten feet.

The Court: Ten, you said, and he didn't quite know which it was. That is my recollection.

Mr. Scholz: If Your Honor please, my notes indicate he said the first statement 15 feet and then——

The Court: On direct examination he said 15 or 16 feet.

Mr. Scholz: That is right. And then when I asked him if he [147] didn't state to me it was eight or ten feet, he answered yes.

The Court: Then he said—well, it was substantially to that effect, you said eight or ten feet——

Q. (By Mr. Scholz): Now——

The Court: He wasn't quite sure.

Q. (By Mr. Scholz): The collision, I mean, the cars came to rest just about the edge of the pavement at the curb here, is that correct, after the impact?

A. That is right, sir. It was right by the street sign.

Q. Then, to the best of your ability now, the best of your knowledge now, it moved—the cars moved eight or ten feet.

A. After they came——

Q. After the impact?

(Testimony of Edwin H. Hartshorn.)

A. After the impact in the intersection, they went back down—the army vehicle drove Mr. Penders' car back down the hill.

Q. Eight or ten feet?

A. That is—somewhere around in there.

Q. And therefore the collision or the Penders' car could not have—well, that is argumentative. No other questions.

Mr. O'Donnell: I think that is all. Thank you.

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Scholz: If Your Honor please—did you subpoena Lieut. Marinello?

Mr. O'Donnell: No, I did not. [148]

Mr. Scholz: With the permission of the Court and of Mr. O'Donnell, may we call Lt. Marinello out of order? He is on our case and has been subpoenaed, but he wants to get back to Monterey, and I think it would only be fair to cooperate. Lieutenant, will you take the stand, then?

FRANK C. MARINELLO

called as a witness on behalf of the United States; sworn.

The Clerk: Will you state your name to the Court? A. Frank Marinello.

(Testimony of Frank C. Marinello.)

Direct Examination

By Mr. Scholz:

Q. Will you please state your occupation?

A. Lieutenant of police, Monterey Police Department, Monterey, California.

Q. And were you such on May 11, 1946?

A. I was.

Q. I hand you herewith Defendant's Exhibit B, being a vehicle accident report to which is attached in typing a statement typed. That was signed by you, Lieutenant?

A. That report was typed out by Officer Davenport under my supervision and signed by me.

Q. By Mr. Davenport? A. Yes, sir.

Q. Now, calling your attention again to May 11, 1946, what was the speed limit on Fremont Street on that date? A. A 55 mile zone. [149]

Q. I want to refer to your notes, Lieutenant, so I will just let you have them there in case I will ask you some questions and then you may refresh your memory.

Q. You investigated an accident on May 11, 1946? A. Yes, sir.

Q. And what time did you reach the scene of the accident? A. 6:41 we received a radio call.

Q. And how soon did you arrive there afterwards, approximately at the scene of the accident?

A. Approximately 6:45, about three or four minutes later.

(Testimony of Frank C. Marinello.)

Q. And was—a collision had taken place just prior to your arrival? A. Yes, sir.

Q. And that was involving a 1934 Hupmobile and an army panel truck? A. Yes, sir.

Q. You are quite familiar with Fremont Street, are you not? A. Yes, sir.

Q. Could you tell me, if you know, at a point approximately 155 feet east of the center of Park Avenue where it runs into Fremont Street and which is designated on this diagram, if you could see an automobile sitting in the Cadillac automobile—I believe you drive a Cadillac? A. Yes, sir.

Q. —if you could see an automobile at the intersection of [150] Augajito Road and Fremont Street, assuming that this Cadillac automobile that you were sitting in is on the north lane of Fremont Street?

Mr. O'Donnell: I am going to object to that, may it please the Court, on the ground that it calls for the conclusion of the witness, and further, on the ground that there is no testimony—that is, the question is not qualified by any conditions under which the view of the road might be made from the distances and the points that Mr. Scholz has mentioned. The testimony here is, as far as Mr. Hartshorn is concerned, he was eight feet—his vision was eight feet above the level of the ground. Now, if the lieutenant is in a position to tell us in what regard, which I think he would be qualified to do but not until some foundation is laid here. I do

(Testimony of Frank C. Marinello.)

not think the lieutenant is in a position to testify and answer the question as put by Mr. Scholz.

Mr. Scholz: May I just simplify matters? May I withdraw that question and ask the lieutenant—

Q. Have you checked the vision on that street near the interesection of Park Avenue?

A. I have.

Q. And you have checked that sitting in what kind of a car? A. Sitting in a Cadillac sedan.

Q. All right. Will you tell the Court, or indicate on the diagram, what range of vision you checked?

Mr. O'Donnell: Just before that question is answered, the only purpose of that testimony, as I can make it out, would be in the way of impeachment of the witness Hartshorn.

Mr. Scholz: Not necessarily so. I want to bring to the Court the evidence that due to the angle of the road and due to the incline of the road, I want to have the Court have the benefit of what vision an automobile would have.

The Court: What is it you want to bring out from this witness? Looking east on Fremont from west of Park Avenue, how far you can see up Fremont?

Mr. Scholz: What I wanted to do generally, Your Honor, is put—of course, I don't know myself, but he checked this vision and I wanted to tell the Court what vision you have of this street near this accident. We will take it at different angles if he can so testify. I don't know what he is going

(Testimony of Frank C. Marinello.)

to testify to. I think it is important that the Court have this information, to know what the vision is on that street, because there is a definite incline up to the intersection and there is a definite dogleg. I think the Court in order to decide the case should have—should be acquainted with all the facts and one of the facts is the vision.

The Court: I think I will admit it.

Mr. Scholz: Will you answer the question? Will you read the question, Mr. Reporter?

Mr. O'Donnell: This will not be impeaching the testimony— [152]

The Court: The only point he wants to bring out is the vision, the length of vision that you can see looking eastward or looking westward either way.

Mr. Scholz: Westward, that is right.

The Witness: May I step down for a minute?

Q. (By Mr. Scholz): Take your time, Lieutenant, and explain to the Court—we want to advise the Court of the facts so that the Court may know.

The Court: Would you ask the witness when he made this investigation.

Mr. Scholz: I will ask him that.

Q. I will ask under what conditions, as a lieutenant of the Police Department—

The Court: When did you make this?

A. April—I mean, that is right, April the 13th at 12:30 p.m.

Mr. O'Donnell: I will stipulate the conditions

(Testimony of Frank C. Marinello.)

of the road are practically the same as on May 11, 1946, there has been no change.

A. That is right.

Q. (By Mr. Scholz): All right. Will you answer that question?

(Question read.)

The Witness: From the center of Park Street, that is the prolongation of Park Street.

Q. The prolongation or the center of Park Street?

A. The center of Park Street out to the edge of the highway to [153] a point 155 feet east of Park, straddling both lines, and giving the benefit, whether a car is on one lane or on the other lane and sitting in the Cadillac anything beyond 155 feet you would not have visibility of anything coming the opposite direction. At a point 155 feet you begin to get a vision.

Mr. Scholz: Thank you very much.

The Court: That is traveling west?

A. Traveling west, yes, sir.

The Court: Wait a minute—traveling west—

Mr. Scholz: That is towards Monterey, Your Honor.

The Court: Toward Monterey.

The Witness: That is right, it is.

The Court: 155 feet from the prolongation of the—

The Witness: The center.

(Testimony of Frank C. Marinello.)

The Court: The center of Park Avenue into Fremont Street——

A. Yes, sir.

Q. You wouldn't have vision——

A. Of any cars coming over from a westerly direction to an easterly direction.

Q. (By Mr. Scholz): Will you indicate on the diagram, stand on the side and just explain it by pointing. You mean there would be 155 feet here straddling this white line? A. Yes, sir.

Q. You are approximately 155 feet east of the center of Fremont Street—— [154]

A. Of Park Street.

Q. At this point here where——

A. That is the center of Park, there is a small plug there about the size of this plug on the floor. That is the extreme center of Park Street.

Q. And from a distance of 155 feet, then——

A. You get a vision.

Q. ——you get a vision down to this point?

A. For anything, because the minute you hit the vision you hit the vision of the entire highway. Beyond that you can not see anything.

The Court: In other words, what you mean is, if you are east more than 155 feet you can't see anything on Fremont Street.

A. No, sir.

Q. But when you reach a point 155 feet from the center line of Park Avenue, then you can see all the way? A. That is right.

Q. West on Fremont, is that it?

(Testimony of Frank C. Marinello.)

A. That is right.

Q. And there is, I would assume, about a ten foot jog in the road, and about a twenty foot—do you mean you are sitting in an automobile or standing up or sitting in the top of a bus?

A. Well, I said sitting in a Cadillac.

The Court: You mean sitting in the Cadillac.

The Witness: On the top of a bus you would reach it sooner than 155 feet.

Mr. O'Donnell: Is that a new Cadillac or an old one?

The Witness: A 1948.

Mr. Scholz: They always drive new Cadillacs.

Mr. O'Donnell: One is lower than the other one.

Q. (By Mr. Scholz): Now, I think you stated that there is approximately a ten foot jog in the road.

A. Before approaching—that is, there is a jog there at the start approaching right there at Park Street.

Q. Will you indicate on the diagram here—

The Witness: In other words, this section of highway.

Q. That section (indicating)?

A. A ten foot jog in this highway.

Q. For the purpose of the record, indicating it turning—indicate the jog on the diagram.

A. This runs straight and this jog begins here.

Q. Begins approximately at the center of Park Street?

A. That is right.

(Testimony of Frank C. Marinello.)

Q. Park Avenue, I should say, and there is, I think you testified, there is about a twenty foot upgrade? A. Upgrade.

Q. Upgrade going east on Fremont Street?

A. Upgrade going east.

Q. To about where, what point? [156]

A. Well, I would say at about where you begin getting your visibility where she stops slanting off.

Q. At about—— A. About 155 feet.

Q. 155 feet east of the center of Park Avenue?

A. Most of the grade is from the center of Park Street down, slight.

Q. In other words, most of the grade of that twenty feet is from the center——

A. The center of Park Avenue.

Q. ——west. A. It jogs—yes, west.

Q. And then there is a slight grade, though?

A. A kind of a hill crest there.

Q. A hill crest north to about 155 feet?

A. That is right.

The Court: You don't mean north 155 feet.

Q. (By Mr. Scholz): I mean east.

A. East, yes.

Q. Did you locate a witness to the accident, Lieutenant? A. No, sir.

Q. Did you discuss this case with Edwin H. Hartshorn? A. No, sir.

Q. In the report it states that Mr. Hartshorn stated to us——

Mr. O'Donnell: I am going to object to that,

(Testimony of Frank C. Marinello.)

may it please [157] the Court. He asked him and he has answered. Now, is he going to check that with the report?

Mr. Scholz: I want to ask him who did the checking.

Mr. O'Donnell: Well, ask him that, but don't be reading the statement.

Mr. Scholz: Well, all right.

The Court: I understood the witness just now to say he didn't talk to Hartshorn.

Mr. Scholz: That is what I understand, too.

Q. In the report there, Lieutenant, there is a statement regarding an interview with Mr. Hartshorn. Do you know who made that interview?

A. Officer Davenport.

Q. Did you discuss this case with—at the time of the accident, with the driver of the military vehicle?

A. No, sir.

Q. Was that done by Sergeant—what was his name?

Mr. O'Donnell: Davenport.

Q. (By Mr. Scholz): Davenport?

A. Davenport, yes, sir.

Mr. Scholz: That is all. Wait a minute—that is all.

Cross-Examination

By Mr. O'Donnell:

Q. Just a minute, Lieutenant. I will only keep you a few minutes. I show you here Plaintiff's

(Testimony of Frank C. Marinello.)

Exhibit 22 and ask you whether that is a fair representation or a correct [158] representation, we will put it that way, of the condition of Fremont Avenue looking west on or about May 16, 1946?

A. Yes, sir.

Q. I see. I am pointing to an object here which appears to be the top of a billboard. Could you tell us whether that is a billboard or not? I will ask you to look at it closely. Being familiar with the vicinity, I was just wondering whether you could tell us whether that was the top of a billboard or not.

A. I can't make it out.

Q. Now, I am again referring to this exhibit, this twenty foot grade that you have mentioned starts right as shown in this photograph at a point where the telephone pole is, is that correct?

A. Well, I would say that it starts at the center of Park Street.

Q. The grade starts at the center of Park Street?

A. I would say it does.

Q. Isn't it a fact—

A. I mean, there is a continuation of the hill crest, but your majority of grade is from Park Street on.

Q. I appreciate that. If you were describing the crest of that particular grade, would you not place it at approximately the point where the telephone pole is shown in that photograph?

A. Do you mean as it starts in going west?

Q. Yes, starts in going west, going down west-

(Testimony of Frank C. Marinello.)

erly, just for the [159] purpose of helping you out in answering my question.

A. Isn't that pole just about in the center of Park Street?

Q. No, no, it is on the easterly curb.

The Court: It is a little bit east.

The Witness: About 20 feet east.

Q. (By Mr. O'Donnell): I will show you here Plaintiff's Exhibit 21 and ask you whether or not that photograph can be of any assistance to you.

A. Yes, that is right. I would say so, according to the photograph.

Q. The grade starts approximately where the telephone pole is? A. Yes.

Q. Now, there is one other question on the—I want to get my directions straight here now. The highway on the—and when I refer to the highway, I mean Fremont Street, Fremont Street running west is—comes up to and is immediately adjacent to the sidewalk east of Park Avenue, is that not correct? A. There is a shoulder there.

Q. No, I am talking about east of Park Avenue, that is, towards Del Monte. A. Yes.

Q. Isn't there a sidewalk between the property line and the pavement? A. No sidewalk.

Q. There is no sidewalk? [160]

A. It is unimproved.

Q. Well, I show you here for the purpose of the record Plaintiff's Exhibit 22.

A. It is unimproved.

(Testimony of Frank C. Marinello.)

Q. It is unimproved, but there is a walkway?

A. There is a walkway.

Q. There is a walkway. O.K., fine, all right. The highway comes right up to the edge of the walkway, is that not correct?

A. That is right, that is correct. There is no curb.

Q. No, there is no curb. I appreciate that. Now, taking the north side of Fremont Avenue west of Park Avenue, the Fremont Avenue pavement does not lie immediately adjacent to the curb on the north side of Fremont Avenue west of Park Avenue, does it?

A. No, there is an unimproved area there.

Q. There is an unimproved area there. That unimproved area, according to our stipulation, is 16 feet wide, is that not correct? A. Correct.

Q. So you have a much wider area west of Park Avenue than you have east of Park Avenue?

A. That is correct.

Q. Is that correct?

A. The diagram is correct.

Q. Uh-huh. Just pardon me one moment. I think that will be [161] all.

Mr. Scholz: I have one or two more questions.

Redirect Examination

By Mr. Scholz:

Q. Lieutenant, I hand you herewith Plaintiff's Exhibit 18. That was taken there shortly after the accident, wasn't it? A. Yes, sir.

(Testimony of Frank C. Marinello.)

Q. But I think——

A. At our arrival at the accident, I got to work immediately on it.

Q. I show you there a pole. It shows in this picture, the pole——

The Court: What is that exhibit?

Mr. Scholz: 18.

The Witness: 18.

Q. So that you can follow this, may I show you two copies of the picture, that is Exhibit—would you indicate on the diagram where that pole is?

A. Well,——

Q. In other words——

A. Of course you have to place your car at the scene to see that they are correct.

Q. Well, whatever you do, I mean just give it to the Court.

A. According to your board here, it would be this pole.

Q. That is what I mean. [162]

A. That is the pole.

Q. The pole, is it not, in Plaintiff's Exhibit 18?

A. That would be this pole.

Q. ——is the pole designated on the diagram and we will mark that M-1. I see. Now, from the— from this picture, by coordinating it, and by the designation of the pole on the diagram, would you indicate the position of those two automobiles when this picture was taken? Indicate that on the diagram.

(Testimony of Frank C. Marinello.)

A. Well, it would be pretty hard to put the cars in their position without going through all those measurements to see that they are in their proper place.

Q. Could you do it briefly?

A. I think it is 53 feet 10 inches.

The Court: Speak a little louder.

The Witness: I believe it is 53 feet 10 inches from the center of Park Street to the front of the MP panel wagon.

The Court: I didn't hear that.

The Witness: From the center of Park Street to the MP wagon, that is the MP car—this is the center here and then you have here—you have 70 feet here and this is the chart here, 53 feet 10 inches from the center of Park.

Mr. O'Donnell: Mark it on the map according to scale.

Mr. Scholz: Yes, using that diagram and your knowledge and your measurements and the photograph, indicate to the best of your ability the position of the government vehicle when you [163] saw it.

Mr. O'Donnell: I wonder if you have a colored pencil that you can use, a colored pencil that will designate it.

A. Well, 53 feet 10 inches, this rule is—I mean the scale here is, one inch is 20 feet, two and a half inches would be 50 feet, correct?

Mr. Scholz: Yes, that is it.

(Testimony of Frank C. Marinello.)

The Witness: And two and three-quarters inches would be approximately—54 feet, right?

Mr. O'Donnell: Well, a little more than that.

The Witness: Well, we will make it $1/32$ nd off. I would say this would be the front of the government vehicle here.

Mr. Scholz: Now, I suggest you might make a little square or something so we won't confuse it.

A. I want to get this other dimension before I start off. To a point eight feet, eight feet eight inches from the north curb of Fremont, which would be this curb in here.

Q. Yes.

A. At a point eight feet would be a little less than half an inch, say about $7/16$, right?

Mr. O'Donnell: Yes.

The Witness: So this would be it, here. Now we can start the—square this off, produces the actual position of your car.

Mr. O'Donnell: The government car.

Mr. Scholz: The government car. Now, will you draw a line [164] out there and make that——

Mr. O'Donnell: M-2.

Mr. Scholz: M-2. Just draw that down there. Draw a little line here and put M-2 there. That is all. Now, can you designate the position of Mr. Penders' car?

A. Well, Mr. Penders' car was almost diagonal to the army car. This would be a little more—the Penders' car was almost diagonal to this, to the

(Testimony of Frank C. Marinello.)

curbing. Of course, his car is not to scale.

Q. We appreciate that.

A. That would be the actual——

Q. Now, will you mark that?

The Court: M-3 is it.

Mr. Scholz: M-3.

The Witness: M-3.

Mr. Scholz: I think that is all. Any questions?

Mr. O'Donnell: That is all, Lieutenant.

Mr. Scholz: Your Honor, may I substitute copies for the Defendant's Exhibit B? The lieutenant wants them back. They are from his official files.

The Court: Well, we haven't read them into the record and I wouldn't have—I wouldn't have them before us in the argument.

The Witness: I mean there is no immediate hurry.

Mr. Scholz: We will return them to you.

The Witness: As long as we get that back. [165]

The Court: We can make photostatic copies and send them back to you.

Mr. O'Donnell: Mr. Scholz is very anxious to get a seat in church and he has asked me if I would ask Your Honor, good Catholic that I am, to adjourn about fifteen minutes before 12:00.

The Court: That is satisfactory to me, but when to?

Mr. Scholz: I think Tuesday.

(Thereupon an adjournment was taken to Tuesday morning, at 10:00 o'clock a.m.)

Tuesday Morning Session
April 19, 1949, 10:00 o'Clock

The Clerk: Penders v. United States; for further trial.

Mr. Scholz: Ready, Your Honor.

Mr. O'Donnell: Ready.

Mr. Halsing: We would like to call Mr. Penders.

WALTER L. PENDERS

called in behalf of plaintiff; sworn.

Direct Examination

By Mr. Halsing:

Q. Mr. Penders, you are the plaintiff in this action, is that correct? A. That's right.

Q. Where do you live?

A. I live in Pacific Grove.

Q. That is in Monterey County, California?

A. Yes.

Q. How long have you lived there?

A. About 24 years.

Q. Mr. Penders, calling your attention to the date of May 11, 1946, late in the afternoon of that day, where were you? A. I was at home.

Q. Did you leave your home that afternoon?

A. I left that afternoon.

Q. With whom? [167]

A. I left there with my wife and a couple of friends.

Q. Did you own an automobile at that time?

(Testimony of Walter L. Penders.)

A. Yes, I did.

Q. What type of automobile was that?

A. It is a Hupmobile.

Q. What year? A. 1946.

Q. Was it 1936? A. '36, yes.

Q. When you left your home, were you driving your automobile? A. Yes, I was.

Q. You said your wife was with you. Where was she in the automobile?

A. She was sitting right back of me in the back seat. Your Honor, I am speaking a little louder because since the accident I am a little deaf.

Q. Where did you go when you left home?

A. We drove up to Monterey, went out Monterey, out Fremont Street, and we were going out to dinner. Do you want me to tell about that?

Q. Yes.

A. We were going out to dinner. We stopped at a place on the highway there at Fremont Street.

Q. Where was that place with relation to Park Avenue?

A. It was about a few hundred yards from where the accident [168] happened.

Q. Was it west or east of Park Avenue?

A. East of Park Avenue. It is between Park Avenue and Monterey.

Q. Therefore, it would be west of Park Avenue? A. Yes.

Q. What happened after you reached this restaurant?

(Testimony of Walter L. Penders.)

A. Well, we got out and saw that the restaurant was closed and we got in and I said, "We will drive up to the next crossing and go back to Monterey and get our dinner there."

Q. What was the next crossing?

A. The next crossing was Park Avenue.

Q. You say you got back into the automobile?

A. Yes.

Q. Did you then drive toward Park Avenue?

A. We drove down toward Park Avenue.

Q. What direction was that from Fremont Street? A. That was east.

Q. You were going east? A. Yes.

Q. As you approached Park Avenue, what did you do?

A. Well, as I approached it, I went—it was a four lane drive there, I drove over onto the center line and I had my hand out there for over a hundred yards before I reached Park Avenue.

Q. Were you familiar with this map? You are, are you not, Mr. Penders? [169] A. Yes.

Q. Would you step down here, please? I hand you here a blue pencil, Mr. Penders. Will you indicate on the map the spot before you reached Park Avenue when you commenced your turn?

A. Commenced my turn?

Q. Yes. A. Here (indicating).

Q. You are indicating the spot. This is west. That is Monterey, that way.

(Testimony of Walter L. Penders.)

A. Oh, this is west? I came in here, came along here.

Q. Indicating the lane for the east-bound travel.

A. Just before I got to it, you mean?

Q. Yes. Before you got to Park Avenue.

A. Before I got to Park Avenue. It would be the inner lane.

Q. Take your time.

A. This is turned around.

Q. Mr. Penders, this is Park Avenue. This is Fremont Street. A. Yes.

Q. Monterey lies over in this direction toward the west.

A. Well, you come in, here is the double line; when I looked down there—if you turned it around, it would be just the reverse.

Q. Take your time.

The Court: Why don't you turn it around for him?

Mr. Halsing: You mean upside down? [170]

The Witness: Yes; upside down.

Mr. Halsing: We will turn the whole board around, this way.

A. Yes; that is more like it. This would be west, here.

Q. Yes. A. Yes; that's more like it now.

Q. Where were you as you approached Park Avenue, in which lane; in which lane were you driving as you approached Park Avenue?

A. In this lane here.

(Testimony of Walter L. Penders.)

Q. Indicating the inner, east-bound lane?

A. Yes.

Q. The inner east-bound lane?

A. Yes. I came along here. When we got here——

Q. Put a mark where you are going to indicate.

A. I was coming along here.

Q. One moment. You are indicating the inner east-bound lane.

A. Coming along here. When I got about here where I made the turn, you mean?

Q. I want to know where you were as you approached Park Avenue?

A. I was on this lane here.

Q. The inner lane? A. Yes.

Q. Put a mark on the map where you started to make your turn from the inner east bound lane into Park Avenue. [171] A. Right here.

Q. I will mark that P-1. When you reached the point of P-1, which is this mark that you have just made on the map, did you look along Fremont Street? A. I did.

Q. Did you look in an easterly direction?

A. Yes.

Q. Did you see any cars coming?

A. None whatsoever.

Q. You did not see any cars coming at all?

A. No.

Q. Then did you give your signal?

A. In making the turn, certainly; I had my hand

(Testimony of Walter L. Penders.)

out all the way from down here, over 100 yards coming up, I had my hand out to make this turn.

Q. You indicate you had your hand out from a point opposite Auguscito Road? A. Yes.

Q. Did you do that after you looked?

A. I made the turn; after I made the turn I looked ahead and I saw this car coming at a tremendous speed.

Q. Where was your car when you first saw this car coming?

A. It was just turned across the highway, turning up in here.

Q. Indicate with your pencil where the front of your car was when you saw the vehicle approaching you; you indicate P-1 as [172] where you started to turn? A. Yes.

Q. Where was the front of your automobile when you saw this car coming?

A. Just about the length of the automobile I was turning.

Q. Indicating the center lane of the west-bound traffic? A. Yes.

Q. Will you put a mark where you say the front of your car was when you saw this vehicle? We will mark that P-2.

Mr. Scholz: P-2 is where he saw the other car?

Mr. Halsing: Yes; the oncoming automobile for the first time. At this point is where Mr. Penders said he started to cross the center line in making his lefthand turn, indicated by P-1. He indicated

(Testimony of Walter L. Penders.)

that at P-2 he first saw the oncoming automobile and at point P-2, he has placed it right on the center line of the westbound travel.

The Court: Yes.

Q. (By Mr. Halsing): What happened next after you saw the oncoming vehicle and your automobile was at this point, P-2; what happened?

A. He came over the hill at a tremendous speed. It seemed like it was only a second he was on me. I looked and his car was skidding, it was swaying. Finally, as I saw him go in back of me, I stepped on the gas to go ahead. As I stepped on the gas to go ahead, I saw him then a few feet away from me, coming [173] right for me, and he struck the front end of the car.

Q. Where was your car at the point of impact? Will you take the stand again? I will indicate the mark that the plaintiff just made with the letter and number P-3 indicating a point on the northern side, what would be beyond the northern edge of the westbound traffic line.

Mr. Scholz: What is that?

Mr. Halsing: P-3. He said that is the point of impact.

The Court: The point of impact.

Q. (By Mr. Halsing): Mr. Penders, what happened after the impact?

A. Well, I don't know what happened then; I was unconscious and, in fact, everybody in the car was, too.

(Testimony of Walter L. Penders.)

Q. Were you hospitalized as a result of the accident? A. Yes.

Q. Had you received any personal injuries?

A. Yes, I had. I had my leg broken and my arm broken and several bad cuts on the scalp.

Q. You were in the hospital being treated for your injuries? A. Yes, I was.

Q. Confining yourself to the injury to your wrist, what did you say happened to it?

A. My left wrist here, badly broken and it was shattered, as the doctor stated. It was——

Mr. Scholz: Not what the doctor stated. [174]

A. Well, my wrist is very bad now; it was shattered. It bothers me a great deal now. I can't use it. I lost control of those fingers; I can't grasp it so well.

Q. (By Mr. Halsing): What treatment did you receive?

A. It was in a cast about seven months, six or seven months; pretty near seven months.

Q. What treatment was given to the wrist?

A. After the cast was removed, then I had a leather support put on there, and I wore that for a number of months.

Q. Did you wear that after you were dismissed from the hospital? A. Yes.

Q. Do you have any permanent injury to your wrist as a result of the accident?

A. Well, no strength; I can't pick up things, and the fingers here, it affected all these cords here, the nerves in my fingers.

(Testimony of Walter L. Penders.)

Q. Does the wrist bother you at all now?

A. Yes. It bothers me a great deal. If I use it a little bit or exercise too much, quite a pain comes up my arm here to my elbow.

Q. Confining yourself to the injuries to your leg, which leg was injured? A. The left leg.

Q. Going back to the wrist again, you were indicating something on your wrist; what is the damage to your wrist; just describe [175] that and show His Honor.

A. Well, it was broken, the bone was badly shattered. You couldn't make a good joint there.

Q. Do you have any deformity there from the injury?

A. Yes, I have. The bone protrudes—well, you can see it. It was broken there. It was shattered so that it is impossible to make a perfect joint there.

Q. Did you have that condition before the accident? A. No.

Q. Was your hand and wrist normal before the accident? A. Yes, yes.

Q. With reference to your left leg which you say was injured, what damage was done to that?

A. The leg was broken and the bones were shattered, here (indicating).

Q. You are indicating where?

A. This knee, in the left knee here.

Q. What treatment did you receive?

A. It was in a cast for about seven and a half or eight months.

(Testimony of Walter L. Penders.)

Q. Was any treatment given to the leg after the cast was removed?

A. Yes; I had an elastic support put on there and I wore it quite a few months, too.

Q. Did you wear that after you were released from the hospital? A. Yes. [176]

Q. Do you suffer any pain now?

A. It bothers me. I can't walk with it. It pains me and I have to rub it to kind of get the circulation in it. The muscles contract here.

Q. Are you able to walk as well as you were before the accident? A. No, not at all.

Q. Why was that?

A. The leg joint here, the knee joint protrudes a great deal like my wrist does. It was a bad break. It will never be the same and it pains me; at times at night it wakes me up and I have to straighten it out and rub it to take that pain out of it.

Q. Was your leg in that condition prior to the accident? A. No, not at all.

Q. Was it a normal leg? A. Normal leg.

Q. I show you Plaintiff's Exhibit No. 7. Will you look those bills over, Mr. Penders?

A. Yes, these are the bills.

Q. Those bills indicate you were in the hospital from the period May 11, 1946 to March 25, 1947. Are those the bills that were rendered to you for your care while in the hospital?

A. Yes; those are the ones.

Q. I show you Plaintiff's Exhibit No. 6 pur-

(Testimony of Walter L. Penders.)

porting to be a bill for medical care and attention. Is that the bill that was [177] rendered to you by Dr. Hugh F. Dormondy? A. Yes.

Q. That was for your care while you were in the Monterey Hospital? A. Yes.

Q. Mr. Penders, you stated that your wife Florence Penders was also injured in this accident?

A. Yes; very badly injured.

Q. Was she hospitalized as a result of the accident?

A. Yes, up to the time she passed away.

Q. That was from May 11, 1946—

A. From May 11, 1946 until Palm Sunday. She passed away a week ago last Sunday.

Q. During the period of time that Mrs. Penders was in the hospital, who was her doctor?

A. Dr. Dormondy.

Q. I show you here Plaintiff's Exhibit 13 purporting to be bills from the Monterey Hospital, Ltd. for service and care to Mrs. Florence Penders. I will ask you to look at those and tell us, if you can, whether those are the bills that were rendered to you by the Monterey Hospital. Are those the bills that were rendered to you for care given to Mrs. Penders? A. Yes.

Q. I show you Plaintiff's Exhibit No. 12, Mr. Penders, purporting to be a bill for medical care and attention from the [178] Monterey Clinic for service rendered to Mrs. Florence Penders. Is that the bill that was presented to you by Mr. Dormondy?

(Testimony of Walter L. Penders.)

A. Yes; they are the ones, that's right; those are the bills.

Q. Now, Mr. Penders, you say your wife passed away on April 10th, was it, 1949? A. Yes.

Q. How long were you and Mrs. Penders married? A. We were married in 1905.

Q. Were you and Mrs. Penders living together constantly during that time?

A. Constantly, ever since.

Q. Were you ever separated for any length of time from Mrs. Penders?

A. No; only about a month. Approximately about a month, that is all. We have never been separated. We have always been together.

Q. When was that month, approximately what year?

A. It was—that was 35 years ago, I guess.

Q. That is the only time you and Mrs. Penders were separated for any length of time?

A. Yes.

Q. Did you and Mrs. Penders travel about quite a bit? A. We traveled a great deal.

Q. Did Mrs. Penders up to the time of the accident keep house for you? [179] A. Yes.

Q. Did she do all of the cooking at home?

A. Yes.

Q. Did she maintain the household?

A. Yes.

Q. (By The Court): Were there any children of your marriage? A. No children.

(Testimony of Walter L. Penders.)

Q. (By Mr. Halsing): Mr. Penders, owing to the death of Mrs. Penders on April 10, 1949, you incurred certain expenses; is that correct?

A. Yes, very much.

Q. What were the funeral expenses?

A. Well, the funeral expenses amount to about, I do not really have the bills yet, but I believe it is about 1200—anyhow.

Q. You say the funeral expenses amount to \$1200?

The Court: About \$1200, he said.

Q. (By Mr. Halsing): Do you have a bill for that?

The Court: No. He said he hadn't had one yet.

Mr. Halsing: That is all.

The Court: Was there any expense connected with the car?

Mr. O'Donnell: That will be stipulated to, Your Honor.

Mr. Scholz: I thought you were going to waive it.

Mr. O'Donnell: Well, it was a 1936 Hupmobile so we are not concerned too much.

The Court: There was something in the complaint. [180]

Mr. Halsing: We were mistaken, Your Honor. In drawing the complaint we thought it was much more valuable than it actually was.

Mr. Scholz: What was the value? We will stipulate the value of the automobile is \$150.

The Court: Stipulate to that?

(Testimony of Walter L. Penders.)

Mr. Scholz: Yes.

The Court: Cross-examination.

Cross-Examination

By Mr. Scholz:

Q. On your direct examination, Mr. Penders, you stated, as my notes show, that as you drove over the center line, you had your hand out and you were about 100 yards from the intersection when you put your hand out; is that correct?

A. Yes.

Q. Then when you were a hundred yards from the intersection, that is 100 yards before you reached Park Avenue——

A. Before I reached Park Avenue.

Q. Yes. Then, as you put your hand out 100 yards before you reached Park Avenue, you crossed over to the left side of the highway?

A. Yes, left side.

Q. That would be the south side of the highway?

A. Yes. [181]

Q. I notice that as you look at the diagram, you had to put on your glasses. Do you use glasses all the time?

A. No. I had glasses I use for driving only, but my sight is very good.

Q. But you use glasses for driving.

A. I use them for driving, yes. I really don't need them. It is a long story. When I took the examination, of course I couldn't read the lowest line, the few last letters, so they had to put on—told me I would have to get some glasses.

(Testimony of Walter L. Penders.)

Q. Did you have a driver's license at the time of the accident? A. Yes.

Q. Have you got it with you?

A. Yes, I have it with me.

Q. May I see it?

The Court: What is the date of that?

Mr. Scholz: The date of this is—it covers the period December 22nd, 1944 to December 22nd, 1948.

Q. When you got your permit to drive, they suggested that you have driving glasses?

A. Driving glasses, yes. I had them on at the time.

Mr. O'Donnell: The license requires it. It is a restricted license. It is right on the face of the license.

Mr. Scholz: So stipulated.

Mr. O'Donnell: So stipulated.

Q. (By Mr. Scholz): I believe you are 81 years old now? [182] A. What?

Q. You are 81 years old? A. 82.

Q. 82 years old now. A. Yes.

Q. At the time of the accident did you have your glasses on? A. I had them on, yes.

Q. As you approached the intersection of Park Avenue and Fremont and as you had reached the intersection of Auguscito Road what lane were you in at the time you were at that spot?

A. When I made the turn?

Q. I am not asking you whether you made the

(Testimony of Walter L. Penders.)

turn now. I think you already said that as you went east on Fremont Avenue you reached Auguscito Road. A. Yes.

Q. What lane were you in when you reached the intersection of Auguscito Road and Fremont?

A. I was in the inner lane; I turned on the inner lane with my hand out until I got up to the intersection.

Q. You turned on the inner lane; you mean the inner lane of the northbound traffic? A. Yes.

Mr. Halsing: Eastbound.

The Witness: No—the eastbound. I was going east.

G. (By Mr. Scholz): You were going east. That is what I am [183] asking you. You mean the inner lane of the eastbound traffic A. Yes.

Q. Or the inner lane of the westbound traffic?

A. Yes.

Q. Well, which? I asked you two different questions.

A. I was in the inner lane of the eastbound traffic just before I made the turn.

Q. You made the turn just about Auguscito Road?

A. No; I made the turn at Park Avenue.

Q. I mean you crossed over? A. Yes.

Q. You crossed over the double line to Auguscito Road?

A. No; I did not cross the double line until I got to Park Avenue.

(Testimony of Walter L. Penders.)

Q. You told me you crossed over approximately 100 yards before you reached Park Avenue?

A. Not the double line, I did not.

The Court: I understood him to say he crossed into the inner lane, the eastbound traffic, about 100 yards before he reached Park Avenue.

Mr. Scholz: I had in my notes that he crossed the center line about 100 yards. However, I think we will let the record speak for itself. I think I can clarify that later.

The Court: That is what I put down here. I put it down here—— [184]

Mr. Scholz: Would you, Mr. Reporter, read back there? It is about the first few questions I asked.

The Court: He said he drove over that center line with his hand out 100 yards before he reached Park Avenue. I took it to mean the center line of the lanes going east, the inner lane going east. Then he said, the first question you asked him, 100 yards before he reached Park Avenue, he had his hand out and crossed to the left side of the south side of the highway. That is the way I wrote it down.

Mr. Scholz: May we open his deposition, Your Honor, please—Mr. Penders' deposition?

The Court: Yes.

Q. (By Mr. Scholz): Mr. Penders, would you look at your deposition at page 9, line 22. Do you recall the taking of your deposition at Monterey on October 2nd, 1948? A. Yes.

Q. May I ask this question——

(Testimony of Walter L. Penders.)

Mr. O'Donnell: Let him read it first.

Mr. Scholz: Page 9, line 22, right there (handing document to the witness).

Mr. O'Donnell: Have you read that?

The Witness: Yes.

Q. (By Mr. Scholz): Is that a correct statement? A. Yes.

Mr. Scholz: I will read the deposition. [185]

“About how many yards were you from where you told me you turned had you first looked for any automobiles going west on Fremont?”

“Answer: Well, all the way down for two or three hundred yards.”

Is that a correct statement? A. Yes.

Q. Now, Mr. Penders, on page 12, line 21—I mean page 19, line 22.

Mr. O'Donnell: Where do you want him to read?

Mr. Scholz: From line 21 to line 26. I asked the question:

“Now, Mr. Penders, did you make an arm signal approximately 75 to 100 feet before you reached the intersection of Park Avenue and—

“A. I did, yes.

“Q. At the time you made the arm signal did you turn? “A. Yes.”

Is that correct? A. Yes.

Q. Were you living in Pacific Grove for 24 years? A. Yes.

Q. And you are quite familiar with Fremont Street? A. Yes.

(Testimony of Walter L. Penders.)

Q. And Park Avenue? [186] A. Yes.

Q. As you approached Park Avenue and were opposite the intersection of Auguscito Road and Fremont Street, how fast were you going?

A. I was going, I guess about 25 miles; just about that.

Q. At that time I think you testified, you were in the north lane of the eastbound traffic?

A. Yes.

Q. Now, as you continued on from that point I have indicated until the point of the impact, did you maintain your speed of 25 miles an hour?

Mr. O'Donnell: Just a moment. For the purpose of the record——

The Witness: Just about that.

Mr. O'Donnell: ——what point is indicated?

Mr. Scholz: Auguscito Road and Fremont.

The Witness: Just about 25 miles.

Q. And you maintained and continued that to the point of impact? A. Yes.

Q. As you were within 100 feet of the intersection of Park Avenue and Fremont Street—what I mean by the intersection, of course I mean the western curb line of Park Avenue, the extension of the westerly curb; is that clear? A. Yes.

Q. As you came within 100 feet of the intersection of Park Avenue and Fremont Street, what was the position of your automobile?

(Testimony of Walter L. Penders.)

A. What was the position? 100 feet before I came to Park Avenue—

Q. Take your time. We can always read the question back.

(Question read.)

A. The position was facing east, of course.

Q. In what lane?

A. I was in the inner lane, going east, with my hand out.

Q. At that particular time was there any automobile following you?

A. Nothing; nothing at all, except there was a bus way back of me there; the Monterey bus was following our direction.

Q. How far back of you was the bus?

A. I couldn't say; maybe 100 yards; it was coming.

Q. That was when you were about 100 feet from the intersection? A. Yes.

Q. Did you notice the bus after that?

A. No, I did not; no, I didn't notice it at all.

Q. You had somebody sitting up in the front seat with you?

A. Yes; Mr. Edlin.

Q. Did you make a remark to him or to Kate Hunt at the time?

The Court: At what time?

Mr. Scholz: At the time when you were approximately 100 [188] feet from the intersection, that you believed you were near your destination and

(Testimony of Walter L. Penders.)

started to swing to the left? A. No.

Q. Were you talking to anybody in the car prior to the impact? A. No, I was not.

Q. You are positive of that?

A. Yes; I am positive of it.

Q. When do you recall talking to anybody in the car prior to the impact?

A. I did not get that.

(Question read.)

A. That was when we stopped at the restaurant down there where we intended to get our meal, but after we got in, it was only a short distance before we got to Park Avenue; I said, "We will go down to Monterey and get our dinner down there." I told them I knew a place down there where we could get a good meal.

Q. Was that after you left the place?

A. After we left the restaurant there.

Q. It was about three or four hundred yards?

A. Yes.

Q. Before you reached the place of the impact?

A. Yes.

Q. Did you have any other conversation that you recall? A. No. [189]

Q. Miss Kate Hunt say anything to you?

A. No.

Mr. O'Donnell: I submit he has testified there was no other conversation.

The Witness: They were in the back seat.

(Testimony of Walter L. Penders.)

Mr. O'Donnell: He testified there was no conversation.

Mr. Scholz: That is correct, but it is cross-examination.

The Court: Yes. You can ask the same question twice on cross-examination.

Q. (By Mr. Scholz): As you reached the intersection of Auguscito Road and Fremont Street, you didn't see any automobiles coming towards you at all? A. None whatsoever.

Q. Then as you made the turn onto the other side of the highway, across this double line, you didn't see any automobile? A. No.

Q. At the time you made the turn?

A. None at all.

Q. You didn't see any automobiles until just an instant before the impact? A. No.

Q. You mean you did not see any automobiles?

A. No, I did not. There was none in sight.

Q. Until just the instant before the impact; is that correct? A. No. [190]

Q. Now, I call your attention to your deposition—by the way, you read this deposition over?

A. Yes.

Q. And did you read it over in the presence of your attorney? A. Yes.

Mr. O'Donnell: No, you did not.

Q. (By Mr. Scholz): You made whatever corrections you deemed necessary? A. Yes.

Q. Calling your attention to page 17, line 19,—
Mr. O'Donnell: How far?

(Testimony of Walter L. Penders.)

Mr. Scholz: Down to line 22, inclusive.

“Q. How far was he” —this is referring to the army vehicle driver— “how far was he from you before he struck you?

“A. He must have been 150 yards.

“Q. That is also that distance from you?

“A. Yes.

“Q. When you first saw him? “A. Yes.”

Is that correct? A. Yes.

Q. You stated, though, just a few minutes ago that you did not see the car, the army car until just an instant prior to the impact. [191]

A. No. It was only—it seemed like almost a second when I discovered him that he was right on top of me almost; it only seemed like a second. It was coming at such tremendous speed.

Q. Will you come down here, Mr. Penders? Calling your attention to this diagram, you will note the peculiar formaton of the entrance of Park Avenue. A. Yes.

Q. That is, it runs around and the entrance ends at the point indicated here—there is an M-3, indicatng the position of the automobile. Is that right? A. Yes.

Mr. O'Donnell: Just a minute. Is that your definition of the entrance to Park Avenue and Fremont?

Mr. Scholz: I am trying to follow that. I don't know. I will put it this way—the map speaks for itself, but I want to test his recollection.

(Testimony of Walter L. Penders.)

Q. The entrance to Park Avenue extends from the point there—it says the end of the point, north edge of pavement.

A. Yes.

Q. And the curb? A. Quite a curb.

Q. It is quite broad at the mouth?

A. Yes; very wide there. It is wider on the lower side; I think this is supposed to be the dividing line (indicating).

Q. There is a white line painted there. It is much wider on [192] the westerly side.

A. Yes.

Q. You will note there are two red blocks which are marked M-2. A. Yes.

Q. Was that the position of the automobile after the collision?

Mr. O'Donnell: Just a minute, please. There is nothing in the evidence here that this witness knows anything about the position of the automobiles. He was unconscious.

Mr. Scholz: I don't know. Maybe he can tell.

The Court: Well, it is cross-examination, of course. If he doesn't know, he can say so. He has already said he was unconscious after the impact.

Mr. O'Donnell: Yes.

Mr. Scholz: I know, but it is cross-examination.

The Court: All right.

Mr. O'Donnell: The judge overruled my objection.

(Testimony of Walter L. Penders.)

The Witness: I was unconscious. What the position was I don't know.

Q. (By Mr. Scholz) Do you know what the position of the automobiles were after the accident?

A. I saw some prints, some pictures of it taken by the police.

Q. No. I mean of your own knowledge. All I can ask you is what you know yourself.

Do you recall the position of the automobiles after the accident? [193]

A. No, I don't know the positions.

Q. Calling your attention to your deposition you will note that there is attached to this deposition a diagram which is not to scale and after considering these marks on there, you will note there is a little square indicated by a 1 in the center and a little square with a 2 in the center. Calling your attention in connection with that diagram to page 15, line 13, I will just read this:

"I will show you the diagram that we have referred to at the opening of this deposition which I will ask to have marked for identification.

"(Diagram marked Defendant's Exhibit 1 for identification.)

"I will call your attention to a little square marked with the figure 2 inside it and ask if that is the position of your automobile at the moment of impact. "A. Not exactly.

"Q. I am only asking you about No. 2 and you have answered the question. "A. Yes.

(Testimony of Walter L. Penders.)

“Q. Wherein does it differ from that little square marked with a 2 inside of it?”

“A. Well, it is different. Of course——

“Mr. O’Donnell: Can you make the diagram where you were when the government automobile hit you?”

“A. This is supposed to be an automobile, which is me. [194]

“Q. Yes; this is supposed to be an automobile which is you and that is a square marked with a 2 in the back. “A. Yes.

“Mr. Scholz: Will you mark on there?”

“A. It doesn’t make any difference. I was up there.”

Mr. O’Donnell: “Up here.”

The Witness: “Up here when I made the turn.”

“Mr. O’Donnell: Yes. Mark there in pencil where you were and put a ‘P’ in the center of it.

“A. About over there. That is where I was.”

Mr. Scholz: There isn’t anything marked on the diagram, Your Honor.

The Court: Anyway I understand when he was answering your questions he was talking about the point of impact.

Mr. O’Donnell: That is it. Not the position of the cars after the accident. Does Your Honor want to take a little recess?

The Court: Yes.

(Recess.)

(Testimony of Walter L. Penders.)

Q. (By Mr. Scholz): During the intermission I looked at the diagram again. I refer to D-1 and there is a D-1 marked on the diagram.

The Court: D-1?

Mr. Scholz: Yes, Your Honor. That D-1 marked on that diagram is the position of the government vehicle at the time [195] of the impact.

Q. Have you any knowledge of the position of the vehicles after the impact?

A. Not at all, no.

Q. Now, the front part of the government vehicle struck the front part of your automobile?

A. The front part of it, yes.

Q. Mr. Penders, as you made the arm signal, did you cross the dividing line?

A. Not until after—I had my hand out at the time I crossed.

Q. You put your hand out first before you crossed the dividing line? A. Yes.

Q. How far did you travel from the time you put your hand out until you crossed the dividing line? A. Oh, about 75 yards, I guess.

Q. Then you crossed into the westbound traffic part of Fremont before you reached the intersection of Park Avenue and Fremont Street?

A. Yes.

Q. How far were you from the intersection of Park Avenue and Fremont Street when you crossed the double white line?

A. I don't just quite get that. How far I was

(Testimony of Walter L. Penders.)

on Fremont Street when I passed the double line?

Q. We can read the question back. [196]

(Question read.)

A. The double white line? I wasn't—I crossed opposite—I was not far from it. I crossed the center line; that is, it comes from Park, the middle of the intersection; I didn't cross until I got—

Q. You state now that you crossed the double white line opposite the center white line?

A. Yes.

Q. Is that correct? Do you understand my question?

A. I made the turn—I didn't cross, no, until I got opposite Park Avenue.

Q. But you had crossed over the double white line first before you made your turn?

A. No, no, I didn't cross over. I didn't cross until I got opposite Park Avenue. That is when I crossed the double line, the center line.

Q. Will you indicate approximately where you were when you crossed the double white line?

A. Here is the line, here. I followed along this line here until I got here, opposite from here, but opposite—I crossed here.

Q. Put a mark on the spot.

A. I crossed here.

Q. Put a mark where you crossed the double white line.

A. Right here. [197]

Q. About where you crossed the double white

(Testimony of Walter L. Penders.)

line. Here is the double white line. You better put your glasses on, I think.

A. I guess I better. I didn't cross the double white line until I got opposite Park Avenue.

Q. Will you put an X where you crossed the double white line. That is the double white line, yes.

A. Well, it was right here; right there (indicating).

Mr. Scholz: Now I will mark that.

The Court: P-4.

Mr. Scholz: P-4. Will you sit down, Mr. Penders?

Q. P-4 indicates the place where you crossed over the double white line. A. Yes.

Q. Now, Mr. Penders, calling your attention again to your deposition, page 11, line 7,—can Your Honor see this?

The Court: Yes.

Mr. Scholz: Line 7 to line 18, inclusive.

A. I don't know how wide it is, anyhow.

Q. I will ask you—I asked this question.

“Mr. Scholz: How many feet were you positioned with the prolongation of the western line of Park Avenue when first you saw an automobile across the double line?

“A. I guess it must have been, oh, 40 or 50 feet.”

40 or 50 feet; is that correct? A. Yes. [198]

Q. “Do you know how wide Park Avenue is where it reaches Fremont Extension?

(Testimony of Walter L. Penders.)

“A. I have no idea how wide it is. It used to be a very narrow street but now they have widened it.

“Q. At the time of the accident, do you know approximately how wide it was?

“A. It must have been 75 feet, I guess.”

Is that correct? A. That’s right.

Q. I believe you stated you did not see the automobile until an instant before the impact; is that correct?

A. Just a few minutes, a few seconds.

Q. Fremont Street, that is up the hill, quite a grade, isn’t there, going east?

A. Going east, yes. This is a grade.

Q. About what per cent grade?

A. About 10 per cent, I judge.

Q. Didn’t you state in your deposition that it was, Fremont Extension is about 25 or 39 degree downgrade?

A. Going into Fremont, yes. At the approach it is about that.

Q. I don’t quite understand you.

Mr. O’Donnell: Well, he doesn’t understand you either.

Q. (By Mr. Scholz): Is there a grade on Fremont Street? A. Yes.

Q. Going east to Park Avenue? [199]

A. Yes, there is.

Q. About what?

A. I judge about 10 per cent maybe not that.

(Testimony of Walter L. Penders.)

It was quite a grade at one time. It has been cut down considerably of late.

Q. I am speaking at the time of the accident. Did you state on page 21 of your deposition that the Fremont Extension is about 25 or 30 degrees downgrade? A. Yes.

Q. Then it starts to level off?

A. Going east?

Q. Going east.

A. It levels after it comes up quite a distance, quite level.

Q. Where does that start?

A. It starts, I imagine, about 200 feet.

Mr. O'Donnell: From where?

A. From Park Avenue.

Q. (By Mr. Scholz): You mean from the east prolongation of the eastern curb of Park Avenue?

A. Yes. That grade was cut down considerably.

Q. I am speaking about the time of the accident, see? A. Yes.

Q. As I understand it, it is about 25 per cent from your deposition, up about a hundred feet.

A. Yes.

Q. After that, 200 feet from the intersection, east intersection, [200] then it levels off.

A. Yes.

Q. Does it start to level off a little bit from Park Avenue, 200 feet east of Park Avenue?

A. It levels—it is about an even grade for about 200 feet; well, I don't know, 100 yards, over 100

(Testimony of Walter L. Penders.)

yards maybe; then it levels off, I don't know just how much there is there, but, anyhow, it starts to level after it goes up about 250 feet there.

The Court: Was it a slight grade from Park Avenue east, a point 200 feet, before it leveled off, or is it 10 per cent?

A. It is 10 per cent; where it comes down, I think maybe about 10 or 11; must be about 15 per cent some places, Your Honor.

The Court: From a point east of Park Avenue up to Park Avenue, as I understand you, it is about a 10 per cent grade? A. Yes.

Q. Then going further towards the west of Park Avenue, I should say west of Park Avenue, yes, up to Park Avenue it is about a 10 per cent grade; is that it?

A. Yes. It runs about the same along there.

Q. Then east of Park Avenue going up for about 200 feet about what grade is there?

A. It starts to level off after it gets up there.

Mr. O'Donnell: The Judge is not asking you that. He wants to know if there is any difference in the grade before you get [201] to Park Avenue going east and after you get to Park Avenue, after you pass Park Avenue and where it levels off, is the grade the same all the way up to where it levels off or does it *offer*?

A. About the same; not much difference.

Mr. Scholz: It would be erroneous. Your Honor will recognize the police officer also testified as to the grade.

(Testimony of Walter L. Penders.)

Mr. O'Donnell: About 10 per cent.

Mr. Scholz: About half that. 20 per cent, he says.

Mr. O'Donnell: Yes; he said 25 per cent in his deposition.

Mr. Scholz: No. The police officer said 20 per cent.

The Court: Which officer was that?

Mr. Scholz: The officer, Lt. Marinello.

Mr. O'Donnell: That is all.

Mr. Scholz: At this time we would like to offer the deposition of Mr. Penders in evidence as Defendant's exhibit next in order.

The Clerk: That will be Defendant's Exhibit E in evidence.

(The deposition of the plaintiff Walter Penders was marked Defendant's Exhibit E in evidence.)

DEFENDANTS' EXHIBIT E

In the Southern Division of the United States District Court for the Northern District of California

No. 27202-H

WALTER L. PENDERS and
FLORA PENDERS,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and FIRST
DOE and SECOND DOE,

Defendants.

DEPOSITION OF WALTER L. PENDERS

October 2, 1948

Appearances:

For the Plaintiffs,

EUGENE O'DONNELL, ESQ.,

Attorney at Law,

785 Market Street,

San Francisco, California.

For Defendant, United States of America,

FRANK J. HENNESSY, ESQ.,

United States Attorney,

U. S. Post Office Building,

San Francisco, California,

RUDOLPH J. SCHOLZ, ESQ.,

Assistant United States Attorney, appearing.

Defendants' Exhibit E—(Continued)

Be It Remembered, that pursuant to written stipulation between Counsel for the respective parties hereto, on the 2nd day of October, 1948, at the hour of 11 o'clock, a.m., in the office of Gordon Campbell, Esq., Attorney at Law, Professional Building, Monterey, California, before me, Charles P. McHarry, a Notary Public in and for the County of Monterey, State of California, duly appointed, commissioned and sworn to act as such Notary Public in the State of California and residing therein, appeared

Walter L. Penders

one of the plaintiffs in the above-entitled action, produced as a witness on the part of defendant, United States of America, who, after being by me sworn to tell the truth, the whole truth and nothing but the truth, was interrogated and testified as will by said deposition be shown.

That at the taking of said deposition, plaintiffs were represented by Eugene O'Donnell, Esq., Attorney at Law, 785 Market Street, San Francisco, California, and defendant, United States of America, was represented by Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco, Rudolph J. Scholz, Esq., Assistant United States Attorney, appearing.

It Was Stipulated by Counsel that the Notary, after swearing the witness, might retire.

Defendants' Exhibit E—(Continued)

It Was Further Stipulated that all objections, save as to the form of the question, be reserved until the time of trial.

It Was Further Stipulated that if said deposition be not signed within ten days after notice of completion to the witness, it may be returned to the Clerk of the Court and offered in evidence, the same as if signed.

WALTER L. PENDERS

being first duly sworn, testified as follows:

Direct Examination

By Mr. Scholz:

Q. What is your name?

A. Walter Leonard Penders.

Q. What is your address?

A. 208 Alder Street, Pacific Grove.

Q. How long have you lived in Pacific Grove?

A. Twenty-three years.

Q. The past twenty-three years? A. Yes.

Q. How old are you, Mr. Penders?

A. How old do you think I am?

Q. How old are you?

A. Well, that will not make any difference.

Q. (By Mr. O'Donnell): What is your age?

A. What do you think?

Q. Well, I am asking you?

A. Well, I will be eighty-two the 19th of January.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. Scholz): Mr. Penders, do you wear glasses?

A. I did all the time. I wore them at the time of the accident. I have not had them since but my eyes have been good. I could see fine but I had my glasses on. I only have worn glasses for reading.

Q. Do you recall an accident that happened about 6:40 p.m. on the 11th of May, 1946? A. Yes.

Mr. O'Donnell: Are you going to use this diagram for the purpose of examining the witness?

Mr. Scholz: Yes.

Mr. O'Donnell: This will be perfectly okay to go into evidence with the understanding, of course, that the marks appearing upon the face of the diagram noted "skid marks" and another line running to a parallelogram noted "2" is not a part of the record.

Mr. Scholz: That's right. Let's exclude everything on there except the markings of the four roads.

Mr. O'Donnell: That will be all right.

Mr. Scholz: And the width, subject to any corrections you want to make, and all other marks, positions of vehicles, or any other marks are out as far as this deposition is concerned.

Mr. O'Donnell: I also understand that the diagram which you have in your hand is not drawn to any particular scale?

Mr. Scholz: I believe that is correct.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. About that time you were driving your automobile? A. About that time, yes.

Q. Where were you driving your automobile?

A. I was driving it out Fremont.

Q. That is in Monterey—

A. Monterey—

Q. —California? A. Yes.

Q. What kind of automobile were you driving?

A. I was driving a Hupmobile.

Q. What model? A. 1934.

Q. Was it in good condition?

A. Good condition, yes.

Q. When did you have it last examined by an automobile mechanic?

A. A short time before.

Q. How long prior to the accident?

A. Two, three months.

Q. What mechanic did you have examine it?

A. Monterey Garage.

Q. Did he find anything wrong with it?

A. Nothing wrong at all.

Q. You were driving—?

Mr. O'Donnell: Fremont Road runs east and west?

Q. (By Mr. Scholz): It's Fremont Extension?

A. Yes.

Q. That runs generally east and west?

A. Yes.

Q. And then, at Park Avenue it slants off to

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

the north? A. To the north, yes.

Q. (By Mr. O'Donnell): It makes a dog-leg, is that correct?

The Witness: Yes.

Q. (By Mr. Scholz): How wide is Fremont Extension?

A. It's a four-lane width, four lanes and it's oh, I judge 75 or 80 feet. Maybe a little more than that.

Q. Are the east bound and west bound lanes on Fremont Extension divided by a lane?

A. Yes, there's four lanes there.

Q. Two lanes going east and two lanes going west? A. Yes, there's a dividing line.

Q. Park Avenue runs north off Fremont Extension? A. Yes.

Q. Aguajito Road runs generally south off Fremont Extension, is that correct? A. Yes.

Q. Now, you were driving in a generally easterly direction on Fremont Extension?

A. Fremont Extension.

Q. And as you approached the intersection of Fremont Extension and Park Avenue and approximately 100 yards west of that intersection, where were you driving?

A. I was driving east on Fremont.

Q. (By Mr. O'Donnell): In what lane?

A. I was driving—I drove up—I was on the second lane.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. Scholz): That's the inside lane?

A. Inside lane—

Q. (By Mr. O'Donnell): For the purpose of the record, what do you term the "inside lane," the one next the double line or the one outside?

The Witness: Next to the double line.

Mr. Scholz: Next to the double line, okay.

Q. At about what speed were you going then?

A. I was going about twelve or fifteen miles per hour, not over that.

Q. As you approached within fifty yards of the intersection of Park Avenue and Fremont Extension what part of the road were you driving on then?

A. I was driving on the second, next to the inner line.

Q. You were driving on the inner lane?

A. Yes.

Q. Next to the double line? A. Yes.

Q. How fast were you going then?

A. Fifteen miles an hour, maybe not that.

Q. As you approached within 25 yards of that same intersection were you in the same position and driving at the same speed as heretofore?

A. Yes, just the same.

Q. Did you make a turn over into—across the double line and into the westbound traffic?

A. Not until I was opposite this Park Street.

Q. You made the turn into the westbound traffic lane? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. When you were opposite Park Street?

A. Yes.

Q. Park Avenue? A. That's right.

Q. Were you within the boundary lines of Park Avenue, if it had been extended straight across Fremont Extension when you made this turn?

A. Yes.

Q. Now, at the time you made this turn were you going to go up Park Avenue?

A. Yes, I was opposite Park Avenue when I made the turn.

Q. That does not quite answer my question.

Q. (By Mr. O'Donnell): Were you going to go up over Park Avenue?

A. Yes, I was going to go over Park Avenue.

Q. (By Mr. Scholz): You were going up Park Avenue? A. Park Avenue.

Q. When you made your turn, how fast were you driving?

A. Well, I could not have been driving more than ten miles an hour, making that turn, uphill, especially.

Q. Fremont Extension, as you approach Park Avenue, is uphill, is it not? A. Uphill.

Q. About how many degrees?

A. I guess it's about twenty-five, thirty degrees.

Q. In other words, it has about a rise of twenty-five or thirty feet within each 100 feet?

A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. As you approached Park Avenue could you see any vehicle going west on Fremont Extension?

A. None whatever.

Q. Now, you could not see any vehicle up to the time you made the turn?

A. No, nothing in sight.

Q. At the time you made the turn to go up Park Avenue could you see any vehicles?

A. No. Oh, I could see quite a distance ahead if there had been any.

Q. You could see quite a distance ahead?

A. Yes.

Q. But you did not see any vehicles?

A. None whatever.

Q. Did you look ahead, that is, east on Fremont Extension, as you made the turn, to see if there were any vehicles coming? A. Oh, sure.

Q. And you did not see any vehicles?

A. None whatever.

Q. How far east on Fremont Extension could you see at the time—just before you started to make your turn to go up Park Avenue?

A. I could see, I guess, 250 feet—250 to 275—all of 275.

Q. All of 275? A. Yes.

Q. There were no vehicles at all going west on Fremont Extension just before you made the turn?

A. None whatever.

Q. As you were in the midst of making your

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

turn to go up Park Avenue, did you see any vehicle going west on Fremont Extension?

A. None whatever, no.

Q. As you completed your turn did you see any vehicles going west on Fremont Extension?

A. No.

Q. Did you look to see if there was any vehicle coming? A. Sure, I did.

Q. You are positive of that?

A. I am positive of that.

Q. When did you first look to see if there were any vehicles coming or going west on Fremont Extension? A. Before I made the turn.

Q. About how many yards were you from where you first made your turn that you first looked for any automobiles going west on Fremont Extension?

A. Well, all the way down, for two or three hundred yards.

Q. And did you continuously look to see if any vehicles were coming or going west on Fremont Extension after you completed your turn?

A. Sure, I did.

Q. Now, was there any vehicle ahead of you as you went east on Fremont Extension?

A. No.

Q. Were there any vehicles on that road at all that you saw? A. Not going east.

Q. That you saw? A. No.

Q. Now, how many feet were you east of the prolongation of the western line of Park Avenue when

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

the front part of your automobile crossed the double line?

A. Oh, I guess I was—well, almost across the highway.

Q. I don't think you quite understood the question. Will you read the question, Mrs. White?

(Question read by reporter.)

Mr. O'Donnell: I object to that on the ground that the witness has testified he did not start to make the turn until he was opposite Park Avenue.

Mr. Scholz: That's right.

Q. Now, how many feet were you—will you read the question again?

(Question read by reporter.)

Mr. O'Donnell: Oh, yes, I see. I am sorry.

The Witness: I don't quite understand that question now. I got an awful knock on the head and I cannot understand as I used to.

Mr. Scholz: The reporter will read the question again.

(Question read by reporter.)

The Witness: I did not go over it until I got opposite there.

Mr. Scholz: Read the question again.

(Question read by reporter.)

Mr. Scholz: How many feet were you east of the prolongation of the western line of Park Ave-

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

nue, when the front part of your automobile crossed the double line?

A. I guess it must have been oh, forty, fifty feet, I guess, forty or fifty feet.

Q. Do you know how wide Park Avenue is where it reaches Fremont Extension?

A. I have no idea how wide it is. It used to be a very narrow street but now they have widened it.

Q. At the time of the accident do you know approximately how wide it was?

A. It must have been seventy-five, I guess.

Q. Now, did you see the Government vehicle which is the subject of this suit, at any time prior to the collision?

A. No, not at all. Let me tell you now, can I—

Mr. O'Donnell: Just answer "yes" or "no." Did you see it? A. No.

Q. (By Mr. Scholz): Have you any explanation?

A. I would like to explain about what I saw—

Mr. Scholz: Just on this question. I cannot take everything at one time. You say you did not see it. You may explain it. If you do not want to explain it, let your answer stand.

A. I did not see it at the time I made the turn.

Q. And I believe you stated that you did not see it at or prior to the impact?

A. No, not at all.

Q. You did not see it at all?

A. No. Well, let's see, I did.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. When did you first see the Government vehicle?

A. I saw it when I was half off the highway and I—do you want any more?

Q. Well, that's all right. What do you mean by that, when you were half off the highway?

A. I mean I was almost off on the south line, the Fremont south line, I mean north line. I was almost off the highway.

Q. As I understand it, you mean the north curb line of Fremont Extension—you were almost off the north line of Fremont Extension when you first saw the vehicle? A. Yes, surely.

Q. What was the position at that time in reference to Park Avenue?

A. Well, it was not more than four feet from being off the highway.

Q. I don't quite understand that. You had better explain it.

A. I was almost off the highway when the vehicle struck me.

Q. In other words, I think you mean that you were almost in Park Avenue— A. Yes.

Q. —when the vehicle struck you?

A. Yes. They show that with photographs they have taken.

Q. Now, what was the position of your vehicle when you first saw the Government vehicle, with reference to Park Avenue? In other words, was it

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

on the west side of Park Avenue or on the east side?

A. It was on the north side—I do not quite understand—you mean Fremont Street, don't you?

Q. I believe you stated the biggest part of your automobile was in Park Avenue when you first saw the Government vehicle? A. Yes.

Q. I want to know were you on the east side of Park Avenue when you first saw the Government vehicle or were you on the west side of Park Avenue when you first saw the Government vehicle?

A. I was out on the east side. I was on the east side.

Q. East side? A. Yes.

Q. Were you at the southwest corner of Park Avenue where it enters into the intersection of Fremont Extension when you first saw the Government vehicle?

A. Yes, I was at the southwest——

Q. Were you in——

A. No, no, that's wrong. I was off the highway almost when I saw it.

Q. You say you were off the highway—you mean you were off that strip between Park Avenue and Fremont Extension? A. Yes.

Q. Now, what was the position of your automobile at the moment of impact?

A. The position—was almost off the highway. Almost off the highway.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Was it in a different position than when you first saw the Government vehicle?

A. No, it was almost off the highway. I will explain if you want me to explain.

Q. All right.

A. I was almost off the highway and I looked up and saw this automobile going and it was going like this—(demonstrating with hand) backwards and forwards and backwards—

Q. That doesn't mean a thing to the reporter—

A. —it was going backwards—

Q. Just a minute, when you go like that with your hands, that doesn't mean a thing to the reporter—

A. —and I saw that he had lost control of it and I thought he would go behind me—

Mr. Scholz: I move that that go out, "I thought he would go behind me."

Mr. O'Donnell: You cannot say what you thought. Just tell what you saw.

Q. (By Mr. Scholz): All right—

A. This is what I saw.

Mr. Scholz: —tell us what you saw, not what you thought.

A. Well, I saw it coming and I see that there was no way of getting out of it and I thought—oh, well, he hit me and I thought he was going in back of me and then I started ahead and in a minute he hit the front end of the car. That's all I remember. I was knocked out completely.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Now, at the moment of impact, then, your automobile was between that little corner on the west side of Park Avenue and the north side of Fremont Avenue? A. Yes.

Q. I will show you this diagram that we have referred to at the opening of this deposition, which I will ask that you mark for identification.

(Diagram marked "Defendant's Exhibit for Identification No. 1" by Reporter.)

and call your attention to a little square marked with the figure "2" inside of it and ask if that is the position of your automobile at the moment of impact? A. Not exactly.

Q. I am only asking you about No. 2 and you have answered the question? A. Yes.

Q. Wherein does it differ from that little square marked with the "2" inside it?

A. Well, it's different. Of course—

Q. (By Mr. O'Donnell): Can you mark on the diagram where you were when the Government vehicle hit you?

A. This is supposed to be an automobile, which is me?

Q. Yes. This is supposed to be the automobile "which is me"—that is a square marked with the figure "2" in the center? A. Yes.

Q. (By Mr. Scholz): Will you mark on there—

A. It does not make any difference. I was up here (indicating) when I made the turn.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. (By Mr. O'Donnell): You mark there in pencil where you were and put "P" in the middle of it? A. Up there. There's where I was.

Q. (By Mr. Scholz): You have marked on Exhibit 1 for Identification a small pencil square and I will move that out and mark that "D1" in pencil?

A. Yes.

Q. Now, I call your attention to the little square marked in it the figure "1"—in the center and ask you if that was the position of the Government vehicle at the time of the impact?

A. Yes, that was it.

Q. That's the position of the Government vehicle? A. The Government vehicle.

Q. (By Mr. O'Donnell): At the time it hit you?

A. Yes, I was almost off the highway.

Q. (By Mr. Scholz): Who was riding in the front seat with you?

A. Somebody by the name of Edlin, David E.

Q. Does he reside here?

A. No, he doesn't.

Q. Where does he live?

A. He lived in Oakland. He came down on a visit and he was killed.

Q. Who was riding in the rear seat, if anyone?

A. My wife and his sister, Mrs. Hunt.

Q. Now, do you know how fast the Government vehicle was going just prior to the impact?

A. It must have been going 75 or 80 miles an

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

hour or he would have had control of it.

Mr. Scholz: "Or he would have had control of it," I move be stricken out.

Mr. O'Donnell: It may go out.

Q. (By Mr. Scholz): Didn't you just tell me, Mr. Penders, that you just saw it just about the time of the impact? A. Yes.

Q. Then upon what do you base your statement that it must have been going 75 miles an hour?

A. Well, from the distance he was at the time he hit me.

Q. How far was he from you before he struck you? A. He must have been 150 yards.

Q. That is, he was that distance from you—?

A. Yes.

Q. —when you first saw him? A. Yes.

Q. That that time that you first saw him, where was your automobile?

A. My automobile was partly off the highway, about half way.

Q. Now, Mr. Penders, isn't it a fact that you crossed the double line into the westbound traffic approximately 75 feet before reaching the intersection of Park Avenue and Fremont Extension?

A. I did not.

Q. About 75 feet west of the intersection of Park Avenue and Fremont Extension were you not talking to the people who were in your car?

A. No.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Were you talking to the people in your car at any time prior to your arriving within 100 feet of the intersection of Park Avenue and Fremont Extension?

A. No, not that I remember.

Q. Mr. Penders, are you insured——?

Mr. O'Donnell: Don't answer that question.

(Discussion between Counsel.)

Q. (By Mr. Scholz): You may answer that question, subject to the objection of Counsel?

A. In one way. I will explain what kind of insurance I carry.

Q. Was your automobile insured against any damage to it? A. No.

Q. Were you insured against any injuries you suffered in this matter? A. No.

Q. Now, Mr. Penders, what part of the Government vehicle struck what part of your vehicle?

A. The front part.

Q. The front part of the Government vehicle struck the front part of your vehicle?

A. Yes.

Q. Do you mean by that the front fenders——?

A. Struck the wheel and the fenders and the motor——

Q. Was it a head-on collision?

A. No, it was the side.

Q. The Government hit either the left or front side of your vehicle? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Which side?

A. Struck the east side crossing into Park.

Q. I am asking you—the front part of your vehicle was struck? A. Yes.

Q. What part was it—sitting in the driver's seat, was it the right front part, the left front part or directly head-on?

A. Right front side.

Q. What front part of the Government vehicle struck your right front part?

A. Struck head on, straight.

Q. The vehicles struck head-on?

A. Head-on, yes.

Q. Now, Mr. Penders, did you make an arm signal approximately 75 to 100 feet before you reached the intersection of Park Avenue and—?

A. I did, yes.

Q. At the time you made the arm signal, did you turn? A. Yes.

Q. Now, did the Government vehicle driver apply his brakes at any time, if you know?

Q. (By Mr. O'Donnell): If you know?

A. No.

Q. (By Mr. Scholz): You do not know if he did or not? A. No.

Q. Were you watching him as he approached?

A. Yes.

Q. As far as you know, he slackened speed?

A. He must have slackened speed because his car

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

was going from one side to the other—he evidently lost his control of it——

Mr. Scholz: Object to his statement, “he evidently lost his control of it”——

Mr. Donnell: Yes.

Mr. Scholz: ——and it may go out by stipulation.

The Witness: You want the direct questions, I see that.

Mr. Scholz: In your words then, he slackened speed?

A. He slackened speed.

Q. How much speed did he slacken say, within 100 feet of the intersection?

A. He did not seem to slacken any. He seemed to have lost control.

Mr. Scholz: I move that “he seemed to have lost control” be stricken out.

Mr. O'Donnell: Stipulated.

Q. (By Mr. Scholz): Within 25 feet of the moment of impact was his vehicle slowing up?

A. I could not see any difference.

Q. You could not see any difference: Now, Fremont Extension up to the intersection of Park Avenue and Fremont Extension is practically level?

A. No, it's hilly, going up.

Q. Going west on Fremont Extension, up to Park Avenue, is that level or is that downgrade or upgrade? A. It's downgrade.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. Then Fremont Extension from Park Avenue going west, is that downgrade also?

A. Downgrade.

Q. Is it more of a downgrade there?

A. Just about the same.

Q. In other words, the whole Fremont Extension is about 25 or 30 degrees downgrade?

A. Yes.

Q. All along there? A. Yes.

Q. Prior to reaching Park Avenue and after passing Park Avenue? A. Yes.

Q. Is the automobile you were driving a green sedan? A. Yes.

Q. Where had you come from prior to the collision? A. Came from home.

Q. Pacific Grove?

A. Yes, Pacific Grove.

Q. You went to Monterey and then went out Fremont Extension? A. Yes.

Q. Where were you going to go?

A. Going out to dinner.

Q. Where? A. Monterey.

Q. Monterey? A. Monterey, yes.

Q. Any particular place in Monterey?

A. Yes.

Q. What was the name of the place?

A. Fremont Avenue. I don't know the name. It's about three or four one hundred yards this side of where the accident was. We stopped there.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

intending to have our meal there but the place was closed so we went on farther.

Q. Were you looking for a place to dine?

A. Yes.

Q. Just prior to that? A. Yes.

Q. Were you just going up Park Avenue to go to a place to dine?

A. We were going up Park Avenue to make the turn and then coming back to Monterey

Q. You were going to make the turn to come back to Monterey? A. Yes.

Q. In other words, you did not intend to proceed north on Park Avenue but turn around and go back west on Fremont Extension?

A. No, we did not expect to go on Fremont. We expected to turn off to Park and go to the next street that runs east and west and go back to Monterey.

Q. What street is that?

A. Franklin, I think it is.

Q. Is Franklin east or west of the intersection of Park Avenue and Fremont Extension?

A. It runs away out past Del Monte, I think, quite a distance.

Q. (By Mr. O'Donnell): You have not answered the question: does it run the same as Fremont?

A. It runs the same as Fremont, east and west.

Q. (By Mr. Scholz): It runs the same as Fremont, east and west? A. Yes.

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

Q. But is it south of Fremont Extension?

A. No, it's north.

Q. North of Fremont Extension?

A. Yes.

Q. In other words, you intended going up Park Avenue and then turn and then go back to Monterey? A. Go west.

Q. Go west to Monterey? A. Yes.

Q. Did you talk to the police at the time of the accident, Mr. Penders?

A. No, I was unconscious. I did not know anything.

Q. You did not know what happened after the accident?

A. No, nothing after the accident.

Q. You do not know the position of your car immediately after the accident?

A. No, only through photographs I have seen of it.

Q. But not of your own knowledge?

A. No.

Q. In other words, after the impact you had no knowledge of what happened for the rest of that day? A. No, not at all.

Q. You are sure, are you, that you did not see any cars coming west on Fremont Street before the impact? A. Yes.

Q. And you are also sure there were no cars

Defendants' Exhibit E—(Continued)

(Deposition of Walter L. Penders.)

going east on Fremont Street, as far as you know, prior to the impact? A. No.

Q. And there were no cars ahead of you going east on Fremont Street? A. No.

Mr. Scholz: I guess that's all.

Mr. O'Donnell: I have no questions.

(Witness excused.)

/s/ WALTER LEONARD
PENDERS.

State of California,
County of Monterey—ss.

I, Charles P. McHarry, a Notary Public in and for the County of Monterey, State of California, residing therein, duly commissioned, sworn and authorized to administer oaths, Do Hereby Certify, that the foregoing is the deposition of Walter L. Penders, one of the plaintiffs in the foregoing entitled action; that said witness, before the taking of his testimony, was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was taken in the offices of Gordon Campbell, Esq., Professional Building, Monterey, California, on the 2nd day of October, 1948, at the hour of 11 o'clock, a.m., and was taken down in shorthand by Olive Calvert White, a competent shorthand reporter and thereafter, by her transcribed into typewriting; that said deposition was thereafter read by said witness and after being

Defendants' Exhibit E—(Continued)

correct in every particular desired by him, it was thereupon subscribed in my presence by said witness.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office this 14th day of October, 1948, at Monterey, California.

[Seal] /s/ CHARLES P. McHARRY,
Notary Public in and for the County of Monterey,
State of California.

[Title of District Court and Cause.]

STIPULATION FOR TAKING THE DEPOSITION OF PLAINTIFF WALTER L. PENDERS

It Is Hereby Stipulated that the deposition of Walter L. Penders will be taken in the office of Gordon Campbell, Professional Building, Monterey, California, on the 2nd day of October, 1948, commencing at the hour of 11:00 a.m., and that it may continue until completed, and that same may be taken under Rule 26(d-2) and (f) of the Federal Rules of Civil Procedure.

Dated: September 11th, 1948.

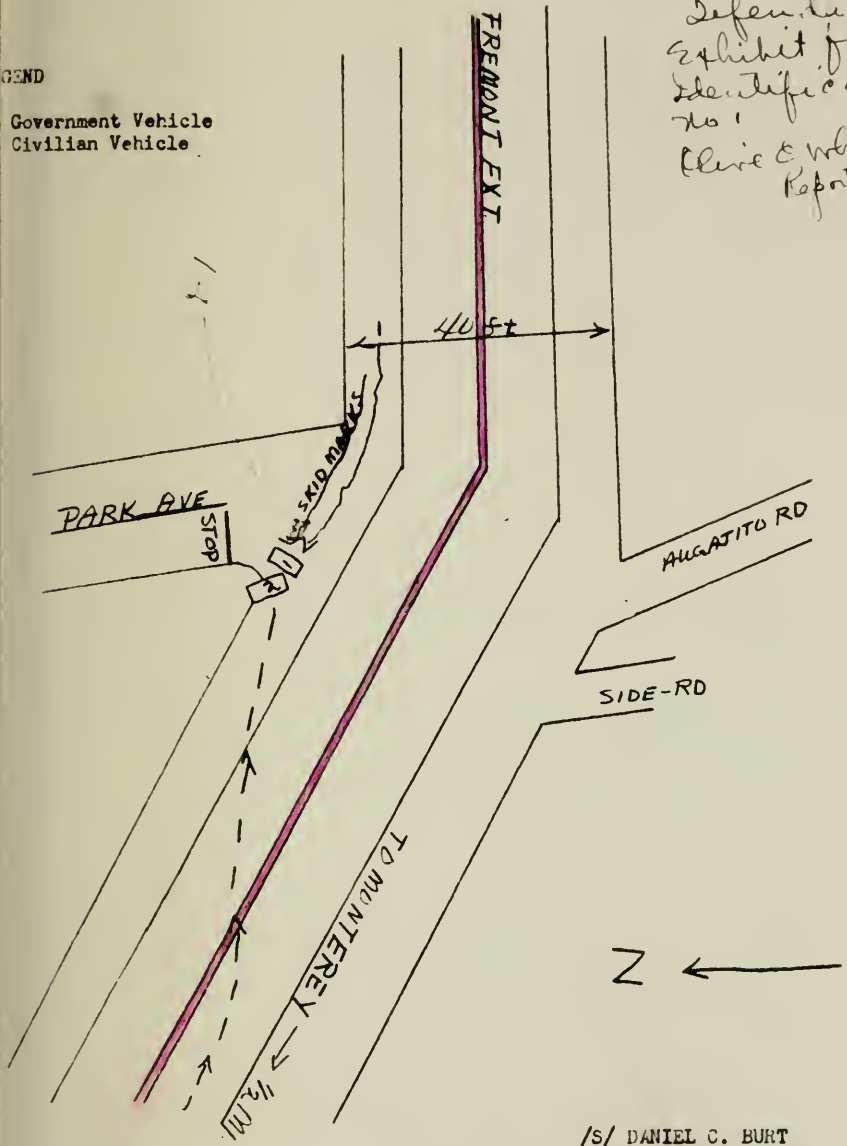
EUGENE H. O'DONNELL,
Attorney for Plaintiff.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant
United States of America.

October 2, 1944
Defendant
Exhibit for
Identification
No. 1
Blue & White
Report

Legend

Government Vehicle
Civilian Vehicle



/s/ DANIEL C. BURT
DANIEL C. BURT
Capt., CWS
Claims Officer

Ex "G"

Filed : Filed April 19, 1949.

Mr. O'Donnell: That is our case, Your Honor.
We rest.

Mr. Scholz: If Your Honor please, it is stipulated relative to the cross-complaint that the damage to the government vehicle was \$326.91, and that is the reasonable cost of repairs [202] to same.

CARL B. WANLESS

called on behalf of the defendant; sworn.

Direct Examination

By Mr. Scholz:

Q. Mr. Wanless, calling your attention to May 11, 1946, were you in the armed services?

A. Yes, I was.

Q. Will you state your name, rank and station?

A. Private, serial number 39496414, stationed at Fort Ord, California.

Q. What was your duty on May 11, 1946?

A. I was on town patrol with the military police.

Q. Were you driving an automobile?

A. Yes, I was.

Q. That afternoon? A. Yes.

Q. What kind of an automobile was it?

A. It was a Chevrolet Suburban carryall.

Q. Was it a half ton? A. Yes.

Q. Are they slightly top heavy?

A. Yes; they are slightly top heavy.

Q. Were you involved in an accident about 6:40 p.m. on that day? A. Yes. [203]

Q. Where were you driving?

A. I was driving into the town of Monterey from the Del Rey theater.

(Testimony of Carl B. Wanless.)

Q. What were you doing driving there?

A. Well, we had been out to the Del Rey theater checking to see if there was any disturbance or anything and we were going back into town to our usual patrolling.

Q. It was routine duty? A. Yes.

Q. Did you have to be at any place at any particular time? A. No.

Q. Calling your attention to this diagram, I showed it to you a few minutes ago—are you familiar with the scale of the diagram?

A. Yes.

Q. You know in this particular diagram one inch equals 20 feet. As you drove west on Fremont Street, state to the Court what, if anything, happened.

A. As I drove west on Fremont Street, I came over the slight hill there and I noticed this other car just crossing the center line into my line of traffic; I would say he was, oh, at least 150 feet, or maybe 175, and he kept coming over at an angle into my lane, so I cut over further towards the outside lane, and I noticed that he still kept coming over at an angle, so I went as close to the curb as I dared and we hit head on [204] there.

Q. About how fast were you going at the time you first saw the other automobile?

A. I would say around 35 or 40 miles per hour.

Q. How do you know that?

A. Well, I know I was doing at least 35 and just a little over, I would say.

(Testimony of Carl B. Wanless.)

Q. How do you know that?

A. I checked the speedometer; I looked at it every once in a while and I had looked at it not too far back and I was doing 30.

Q. Did they have any speed regulations at Fort Ord at the time?

A. 35 miles an hour is supposed to be the limit for government automobiles.

Q. When you saw this other vehicle that you collided with, did you put on your brakes?

A. Yes, I did.

Q. Could you state about how far you put your brakes on?

A. Well, I started slowing down just as soon as I noticed him over in my lane; I put them on all the way until we hit.

Q. Will you come down here to the board. I will give you a red pencil. This is according to scale. Have you a ruler?

Mr. O'Donnell: The Clerk has one.

Q. (By Mr. Scholz): Will you state how far you were, approximately, [205] from Park Avenue when you first saw the Penders car? Was it a green sedan, do you recall?

A. I don't recall the color. It was a sedan.

Q. About how far from the intersection were you when you first saw his car?

A. Oh, I would say about 80 feet.

Q. When you say 80 feet, do you mean from the curbline or the center of the street?

(Testimony of Carl B. Wanless.)

A. From the center of the street.

Q. Will you indicate, according to the scale there, about the position of your car and also the lane that your car was in when you first saw him? This is when you first saw—we will call it Mr. Penders' car. Mark that W-1.

Now, will you indicate the lane and the distance from your car that Mr. Penders' car was when you first saw it; draw it to scale there; also the lane. I will mark that W-2. Here is the position of his car when he first saw the Penders car and here is the position of Penders' car at the time.

The Court: On the double line?

Mr. Scholz: Yes; just a little bit more over to the left, almost in the center of the double line.

Q. You stated when you saw his car you stepped on the brakes? A. Yes.

Q. Of course, you slowed down? A. Yes.

Q. Then the route of Mr. Penders' car was—will you indicate with a dotted line as near as you recall the position that Mr. Penders' car took up to the point of impact?

The Court: Will you indicate that on the map?

Mr. Scholz: Yes. Here is Mr. Penders' car and here is the dotted line, here. Now, will you indicate on there the position of Mr. Penders' car at the time of the impact between your car and his car?

Now, I will mark that W-3.

Will you indicate on there the position of your car at the moment of impact with Mr. Penders' car?

(Testimony of Carl B. Wanless.)

I will mark that W-4.

Now, will you sit down again, Mr. Wanless.

After the impact, was either car moved any distance?

A. I couldn't tell for sure. They were spun around, but I couldn't tell whether they were moved any distance or not.

Mr. Scholz: I think that is all. Well, may I ask one more question.

Q. You are out of the service now?

A. Yes.

Q. What is your occupation now?

A. I am attending a college right now.

Q. Where? A. Clark College.

The Court: How old are you? [207]

A. 22.

The Court: Then you were 19 at the time of the accident?

A. Yes, I was.

Cross-Examination

By Mr. O'Donnell:

Q. How long had you been stationed at Fort Ord prior to May 11, 1946?

A. About four months.

Q. Four months? A. Yes.

Q. How long prior to May 11, 1946, were you attached to this particular assignment of driving this military patrol automobile?

A. The four months.

(Testimony of Carl B. Wanless.)

Q. During that four months' period you drove over Fremont Extension quite often?

A. Well, not quite often, but I did drive over it, you might say, often.

Q. Approximately how many times a day would you say you passed the intersection of Park Avenue and Fremont? A. I would say once.

Q. Once a day? A. Yes.

Q. For a period of four months?

A. Well, we only had duty four or five days a week up here.

Q. But every day you were on duty you passed there at least [208] once a day; is that correct?

A. Not every day.

Q. However, as a result of your driving this vehicle, you became familiar with the contour of the highway in the vicinity of Park Avenue and Fremont; is that not correct? A. Yes.

Q. And you knew there was an intersection there, you knew the location where Park Avenue came into Fremont Extension?

A. Not too sure, no; I didn't know exactly where it was.

Q. Well, did you know on May 11th, from your previous experience in driving that automobile, that there was a grade which started west of Park Avenue and ended easterly with regard to Park Avenue?

A. Yes.

Q. Did you know from your experience of driving over that terrain, along that highway, that one traveling west, such as you were on this particular

(Testimony of Carl B. Wanless.)

day, would have difficulty because of the contour of the land, the construction of the highway, of seeing cars which were traveling in the same direction, west on Park Avenue?

A. I hadn't noticed it particularly before.

Q. You hadn't noticed it particular before?

A. No.

Q. In your driving had you ever noticed how far when one was approximately 100, 200 feet east of the Park Avenue, how far [209] he could see west of Park Avenue along Fremont Extension?

A. I hadn't noticed. We didn't always drive; we changed around. Whoever happened to be assigned as the driver for that day. I perhaps drove maybe one-quarter of the time I went by there.

Q. However, the fact still remains that you were familiar with this particular intersection?

A. Yes.

Q. Do I understand that you never took particular note whether driving or whether riding as a passenger, as to the contour and the layout of this particular highway around that Fremont Extension?

A. Well, it never seemed to me that there were any particular blind spots there.

Q. Do you know how many lanes are in that particular road? A. Yes.

Q. How many? A. Four.

Q. And on each side is there a shoulder?

A. Yes.

(Testimony of Carl B. Wanless.)

Q. Have you any idea of how wide the shoulders are? A. No, I don't.

Q. You don't. You are familiar with the grade, the downgrade that starts immediately west of the easterly curblineline of Park Avenue, are you not?

A. Yes.

Q. What percentage grade would you say that was, to the best of your recollection, as you remember?

A. I would say 10 to 12 per cent.

Q. Ten to twelve per cent. I don't know whether I asked you this or not: One traveling, such as you were on this particular day, that is, the day of the accident, could see people traveling in front of you, that is, people traveling in the same direction as you all along Fremont Street in the vicinity of Park?

A. I didn't notice any particularly ahead of me; there were behind me.

Q. I am just talking now; you are driving an automobile; let's put you back here, W-1, that indicates, my recollection is that that was your position when you first observed the Penders car.

A. Correct.

Q. From the position you have marked W-1, can you tell us approximately how far you could see on Fremont Street in an easterly direction ahead of you?

A. I would say 200 yards.

Q. 200 yards? A. Yes.

(Testimony of Carl B. Wanless.)

Q. That would be 600 feet? A. Yes. [211]

Q. It was at this position marked W-1 that you first observed Mr. Penders' automobile?

A. Correct.

Q. And the Penders automobile at that time was in the position you have marked W-2; is that correct? A. That is correct.

Q. And you say that position, W-1, is approximately 80 feet from the center protruding line of Park Avenue? A. Yes.

Q. After this accident and prior to coming to court today, did you ever discuss this case with anyone?

A. I was shown the statements and photographs taken at the time.

Q. Did you discuss this particular accident with the police officers?

A. Yes, at the time of the accident.

Q. Was that at the time of the accident or subsequent to the accident?

A. Well, within an hour after.

Q. Within an hour of the accident. Where did that discussion take place?

A. In Monterey Hospital.

Q. Who was present?

A. Just the police officer and myself.

Q. Do you know who that police officer was, by name? [212] A. No, I do not.

Q. At that time you gave the police officer a statement; is that correct? A. Yes.

(Testimony of Carl B. Wanless.)

Q. Have you got that statement? Was that in writing?

A. He just filled it out on a form, I believe, a standard form at the time.

Mr. O'Donnell: Have you got that statement, Mr. Scholz?

Mr. Scholz: Not if he gave it to him. Did you make a duplicate of that and turn it in to the CMP? A. No.

Mr. Scholz: I mean the statement that you gave to the police officer. A. No.

Mr. O'Donnell: Other than the conversation that you had in the Monterey Hospital, did you have any other conversation subsequent to that with any members of the Monterey Police Department?

A. No.

Q. You did not? A. No.

Q. In what lane were you traveling when you first observed the Penders' automobile?

A. I was in the outside lane.

Q. In the outside lane? [213]

A. Yes; perhaps in the inner side of the outside lane.

Q. The inner side of the outside lane. In other words, you were traveling close to the shoulder of the road?

A. No. I was traveling closer to the center part of the outside lane.

Q. You were traveling on the dividing lane?

A. No. I was right close to it.

(Testimony of Carl B. Wanless.)

Q. Perhaps, maybe riding it?

A. That might be right.

Q. Did you continue riding in that same direction, riding the dividing line on the north side of the highway up until the time of the accident?

A. No; I turned to my right as soon as I observed the car in my lane.

Q. When you observed the car in your lane; is that correct? A. Yes.

Q. Now, when you first observed the car, the Penders' car, you have it straddling the double line in that position at W-2; is that correct?

A. Yes.

Q. Isn't it true you did not see the Penders' car until it was in the inside lane of the west-bound traffic?

A. I noticed him coming into my lane.

Q. You didn't see him coming into your lane?

A. I say I did notice him coming into my lane.

Q. Isn't it true you told the police officer in the Monterey Hospital that you first saw Mr. Penders' car pulling into your lane of traffic?

A. Yes.

Q. That is it? A. Yes.

Q. How far had he proceeded into your lane of traffic when you first observed him?

A. I would say he was better than halfway into my lane.

Q. He was better than halfway into your lane of traffic? A. Yes.

(Testimony of Carl B. Wanless.)

Q. At that time you were traveling the inside lane, weren't you?

A. Yes; the outside lane.

Q. The outside lane, rather; yes. Near the dividing line. So when you first observed Mr. Penders' car, he had crossed the double line and had proceeded into the outside lane, isn't that correct?

A. Yes.

Q. So he was way over on the north side of the highway when you first observed him?

A. He was coming over, yes.

Q. But he was in your lane of travel and you were on the outside lane when you first observed him?

Mr. Scholz: I will object to that on the ground it is [215] already asked and answered.

The Court: That does not apply to cross-examination.

Mr. Scholz: I withdraw my objection.

Q. (By Mr. O'Donnell): Approximately how fast, in your opinion, was Mr. Penders' driving when you first observed him?

A. Oh, I would say 25 or 30 miles an hour.

Q. 25 or 30 miles an hour. When you observed him, did you sound your horn? A. No.

Q. You didn't sound your horn. Was your automobile equipped with a horn? A. Yes.

Q. When you observed Mr. Penders in your line of traffic when you were at a point marked by W-1 on this map, what did you do?

(Testimony of Carl B. Wanless.)

A. I applied my brakes and started pulling over to the righthand side.

Q. Pulling over to the righthand side?

A. Yes.

Q. By pulling over to the righthand side you were directing your car in the same direction in which Mr. Penders' car was being driven across the highway, weren't you? A. Yes.

Mr. O'Donnell: Does your Honor want to take a recess now until 2:00 o'clock?

The Court: Yes.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [216]

April 19, 1949, 2:00 o'Clock

CARL B. WANLESS

resumed the stand; previously sworn.

Cross-Examination (Continued)

By Mr. O'Donnell:

Q. Now, Mr. Wanless, as you were proceeding westerly along Fremont Street towards Park Avenue, did you see any automobiles traveling towards you easterly in the opposite direction?

A. No. Just the one of the plaintiff up here.

Q. You just saw——

Mr. Scholz: I object to that on the ground the question is vague.

Mr. O'Donnell: I will reframe the question. When you reached a point marked W-1, did you

(Testimony of Carl B. Wanless.)

see any cars approaching you on the southerly side of the highway traveling east? A. Only one.

Q. What car was that?

A. That was the plaintiff's car.

Q. That was Mr. Penders' car? A. Yes.

Q. You did not observe any other automobile?

A. I didn't see any other.

Q. You didn't see any other. Did you see a bus, one of those transportation buses that operates in and out of Monterey? [217] A. No.

Q. You did not? A. No.

Q. When you first observed Mr. Penders' car from the point which you have marked W-1, did you notice whether or not Mr. Penders had his arm extended?

A. I didn't see if it was extended.

Q. You did not see his arm extended at all. Approximately how far east of Park Avenue is that Del Rey theater?

A. I believe it is about two miles.

Q. And from the time that you left the Del Rey theater up until the happening of this particular accident, did you stop at all in that two mile distance? A. No.

Q. You were driving from the Del Rey theater; is that correct? A. Yes.

Q. Who was in the car with you?

A. Another private, Arthur Dobson.

Q. As I understand, when you first observed the plaintiff's car from the position marked W-1, you

(Testimony of Carl B. Wanless.)

were traveling 35 miles an hour; is that correct?

A. Approximately, yes.

Q. Would you say it was more than 35 miles an hour?

A. I would say it was between 35 and 40.

Q. Between 35 and 40? [218] A. Yes.

Q. You are sure your speed was not exceeding 40 miles per hour?

A. Yes; I am sure of that.

Q. How long had you been maintaining that speed?

A. Oh, I guess I had been traveling at that speed, you might say——

Q. Since your departure from the Del Rey theater? A. Yes.

Q. Before you reached the point marked W-1 on the map, between that point and the Del Rey theater, do you recollect whether or not you passed any other automobile?

A. Yes; I passed one or two, I believe.

Q. Passed one or two other automobiles.

Q. You at all times maintained a speed not in excess of 40 miles an hour?

A. I would say that, yes.

Q. When you observed Mr. Penders' automobile from the position that is marked W-1, what did you do?

A. I applied my brakes and started pulling over towards the shoulder.

Q. You applied your brakes and you mentioned

(Testimony of Carl B. Wanless.)

brakes. Did you apply the footbrake and the emergency brake, or just your footbrake?

A. Just the footbrake.

Q. How long had you been driving this particular automobile? [219]

A. Oh, I would say a couple of months.

Q. When you were assigned to duty, was the same automobile assigned to you at all times?

A. No. We drove different vehicles.

Q. But for a period of approximately two months prior to this accident, you were driving this particular automobile? A. Off and on.

Q. What was the condition of its brakes?

A. I would say it was fair to good.

Q. They were fair to good. Will you give us your definition of what you mean by being fair to good?

A. Well, if you pushed them down about halfway and they would take hold pretty fair and if you pushed them down all the way down, they would lock up on you.

Q. When you first applied your brakes at the position marked W-1, how far did you apply them, halfway or all the way?

A. I had them on all the way.

Q. You had them on all the way. Can you tell us, if you remember, whether or not your wheels locked?

A. I believe some of them must have locked because I heard the tires howling a little.

(Testimony of Carl B. Wanless.)

Q. Did you have occasion after the accident to observe the skid marks upon the pavement?

A. No, I didn't.

Q. You never took it upon yourself after the accident and [220] after you left the hospital to stop there and look at the skid marks?

A. I was in the hospital for three days.

Q. You were in the hospital for three days.. Have you any recollection when you applied your brakes of your car, the rear end swaying back and forth?

A. No, I don't think it swayed back and forth.

Q. Did it do any at all?

A. Very little.

Q. You didn't notice anything unusual in the swaying of the car? A. No.

Q. When you applied your brakes immediately— A. They applied pretty evenly.

Q. Did you have your foot applied to the brake from the time you first applied it at position W-1 up until the time of the actual impact?

A. Yes.

Q. At no time did you release it?

A. Maybe at the last second, but I believe, as far as I know, I had them on all the way.

Q. You say maybe at the last second. Can you give us any reason why you released them at the last second?

Mr. Scholz: He didn't say he released— .

(Testimony of Carl B. Wanless.)

Mr. O'Donnell: He said maybe until the last second. [221]

A. Just before you hit, it seemed like everything blacked out. The last I can remember, it seemed to me we were about ten feet apart. After that I don't remember anything.

Q. When you saw an accident was about to happen, did you get, if I might use the expression, jittery,?

A. No, I don't think so; there wasn't time to get jittery.

Q. Did you lose consciousness at the scene of the accident? A. Yes.

Q. Have you any recollection how long you remained in a state of coma?

A. Oh, I would say about five minutes or ten minutes.

Q. When you returned to your normal self again, were you at the scene of the accident?

A. Yes.

Q. Approximately how long did you remain there before you were taken to the Monterey Hospital?

A. I would say five minutes more.

Q. I show you here Plaintiff's Exhibit No. 20 and ask you whether or not you can recognize the cars in that picture.

A. Yes. That is the one I was driving and that is the one Mr. Penders was driving.

Q. The one that you were driving, will you

(Testimony of Carl B. Wanless.)

point to it? A. This one.

Q. That is the one with all the front end crushed in; is that correct? [222] A. Yes.

Q. I show you here Plaintiff's Exhibit No. 18 and ask you whether you can identify those two automobiles. A. Yes. These are the same two.

Q. These are the same two, and the one which appears to have the entire front end crushed in is the automobile which you were operating; is that correct? A. That is correct.

Q. Calling your attention to the righthand corner of Plaintiff's Exhibit No. 20 with reference to this object here, I will ask whether you can identify that particular object.

A. It looks like a seat.

Q. Does that in any way look like what corresponds to the seat that was in and a part of the automobile which you were operating?

A. That looks quite a bit like them; they were folding seats like that.

Q. They were folding seats like that. I show you another object that appears to be a seat upon which the officer appears to be writing and ask whether or not you can identify that.

Mr. Scholz: How do you know that is another object?

Mr. O'Donnell: I don't know whether it is a seat or not.

Mr. Scholz: It might be the same one.

Mr. O'Donnell: No; it is at a different location.

(Testimony of Carl B. Wanless.)

Mr. Scholz: It may have been moved.

Q. (Mr. O'Donnell): Both of them are in the picture.

A. It looks like another folding seat.

Q. Mr. Wanless, after you returned to consciousness, did you remove any of the seats from your automobile? A. No, I don't think so.

Q. You did not. Did you see anyone else remove any seats from your automobile?

A. Not while I was there, no.

Q. Were you still at the scene of the accident when the photographs were being taken by Sgt. Simpson of the military police department?

A. No, I don't think so.

Q. You have no recollection of that?

A. No.

Q. You don't know whether you were there or not? A. No.

Q. After you returned to consciousness, can you tell us whether or not you remember if you saw either one of the seats of the car which you were operating at the time, on the street as portrayed by these two exhibits which I have just showed you, namely, 18 and 20?

A. No, I don't think so.

Q. You did not see them at all?

A. No. [224]

Q. Where were you at the scene of the accident when you returned to consciousness?

A. I was sitting in the driver's seat.

(Testimony of Carl B. Wanless.)

Q. You were sitting in the driver's seat?

A. Yes.

Q. Behind the wheel?

A. Yes, behind the wheel.

Q. You remained there until you were removed?

A. No. I turned on the radio and phoned in and told them to send an ambulance and a wrecker to Fremont and Park Street. Then I assisted the other fellow out and we got out and we were walking around when the ambulance came.

Q. Can you give us any idea, approximately, how fast you were driving at the time of the actual impact?

A. No, I can not.

Q. You can not? A. No.

Q. I understand, if I am correct, from your direct examination you are not in a position to tell us whether after the actual impact the cars moved.

A. No, I am not. They spun around a little, but as far as actual forward and backward movement, I can't tell that.

Q. Can you tell us what portion of Mr. Penders' car your car struck?

A. It seemed like I struck his right front corner of his car.. [225]

Q. The right front corner of his car.

A. Yes.

Mr. O'Donnell: I think that is all, Mr. Wanless. Thank you.

(Testimony of Carl B. Wanless.)

Redirect Examination

By Mr. Scholz:

Q. Mr. Wanless, when you were at W-1, Mr. Penders' car was at W-2. Now, as you went down there, as I understand it, you pulled to the right, or to the north, to avoid his car? A. Correct.

Q. If Mr. Penders had remained straight, continued straight on, or had not gone to the right side of the road, he would have avoided——

Mr. O'Donnell: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Scholz: That's all.

(Testimony closed.) [226]

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 226 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ KENNETH G. GAGAN,

/s/ B. E. O'HARA,

/s/ RUTH WESTFIELD.

[Endorsed]: Filed Dec. 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Damages Under Federal Tort Claim Act.

Answer and Cross-Complaint.

Answer to Cross-Complaint.

Amendment to Complaint—To second cause of action in plaintiff's complaint.

Amendment to Complaint—To first cause of action in plaintiff's complaint.

Amendment to Complaint—To third cause of action in plaintiff's complaint.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket.

Praeceptum for Preparation of Record on Appeal.
Statement of Points to be Relied Upon On
Appeal.

Reporter's Transcript—Vol. 1 for April 14, 1949;
Vol. 2 for April 15 & 19, 1949.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

Defendant's Exhibits Nos. A, B, C, D, E, and E.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
14th day of December, A. D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12425. United States Court of
Appeals for the Ninth Circuit. United States of
America, Appellant, vs. Walter L. Penders and
Flora Penders, Appellees. Transcript of Record.
Appeal from the United States District Court for
the Northern District of California, Southern
Division.

Filed December 14, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12425

In the Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, FIRST DOE
and SECOND DOE,

Appellants.

v.

WALTER L. PENDERS and FLORA PEN-
DERS,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The Trial Court erred

1. In not finding appellant Walter L. Penders was guilty of contributory negligence.
2. That the findings of fact or part thereof are not supported by the evidence.
3. That Flora Penders is not entitled to any damages and her damages cannot be added to Walter Penders' damages.
4. That the damages are excessive.
5. That the Court erred in excluding evidence that the appellees were insured or were compensated for the damages alleged by said appellees.

/s/ FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

Dated: December 16, 1949.

[Endorsd]: Filed December 20, 1949.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD MATERIAL TO
CONSIDERATION OF APPEAL

To the Honorable William Denman and to the Honorable Associate Justices of United States Court of Appeals for the Ninth Circuit:

United States of America, Appellant herein, designates for printing the entire certified Transcript of Record, deeming said entire record material to the consideration of this appeal.

Dated: January 13th, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed January 13, 1950.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR USE OF ORIGINAL
EXHIBITS ON APPEAL

It Is Hereby Stipulated by and between the parties hereto that the originals of all the exhibits filed in the trial Court in this cause and heretofore transmitted to the Court of Appeals for the Ninth Circuit need not be printed as part of the Record on Appeal but may be considered in their original form and in such original form shall constitute a part of the Record on Appeal; provided further that ex-

cerpts from said exhibits may be printed as appendices to either Appellant's or Respondent's briefs herein.

Dated: This 17th day of January, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for the Appellant.

/s/ EUGENE H. O'DONNELL,
Attorney for Appellee.

/s/ ROBERT E. HALSING,
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Judge of the Court of Appeals.

Dated: January 20, 1950.

/s/ WILLIAM HEALY,
/s/ HOMER BONE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed January 20, 1950.

